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A  
**Digest**  
OF  
**THE LAWS OF ENGLAND.**

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**VOL. VII.**

1917

# THE LIFE OF LORD

1917

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A  
**Digest**  
OF  
**THE LAWS OF ENGLAND.**

BY  
THE RIGHT HONOURABLE  
SIR JOHN COMYNS, KNIGHT,  
LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

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*The fifth Edition, Corrected,*  
(WITH CONSIDERABLE ADDITIONS TO THE TEXT)  
AND CONTINUED  
FROM THE ORIGINAL EDITION TO THE PRESENT TIME;  
TO WHICH IS ADDED,  
A DIGEST OF THE CASES AT NISI PRIUS,  
*By ANTHONY HAMMOND, Esq.*  
OF THE INNER TEMPLE.

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VOL. VII.  
FOUR — YEAR,  
AND THE ADDENDA.

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A

# DIGEST

OF THE

## LAWS OF ENGLAND.

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### (A) How it shall be raised.

#### (A 1.) Upon what estate.

In conveyances to an use, a man may direct or model the use as he pleases, and the st. 27 H. 8. 10. executes the possession to the use; and therefore, he may annex powers to estates, which cannot be annexed to them by a conveyance at the common law. Co. Lit. 237. a. Mo. 610.

And, therefore, to the limitation of an use for life, he may annex a power to make leases for 21, 99, or more years, or for one, two, or more lives.

Or, to make a jointure for a wife. Mo. 381. 2 Lev. 58.

Or, to grant annuities, raise portions, &c. Mo. 381.

Or, to make a jointure, and also a lease to commence after his death, for portions, &c. Hard. 413.

So, he may annex a power of revocation of all uses limited, to make a limitation of new uses, and this will not be repugnant. Co. Lit. 237. a. R. Mo. 610. Vide Uses, (L 2. &c.)

So, a power may be annexed to an estate by another deed, executed at the same time, though it be not in the same conveyance by which the estate is conveyed. 1 Vent. 279.

So, a man may give a power or authority by will, which is a naked authority, not annexed to an estate; as, if he devises to A. for life and afterwards that it shall be at his disposal to any of his children then living; he has but an estate for life, with a naked power to dispose, in the manner directed by the will. R. 1 Sal. 240. 3 Sal. 276.

So, he may give a power to a stranger, which is a naked collateral power not annexed to an estate. Per Hale, Hard. 415.

Or, a power in gross, which takes effect after his estate determined, Hard. 415.

If a power be to A. or his assigns to make leases, &c. the power runs with the estate to the assignee in deed, or in law. R. 1 Vent. 340. 2 Jon. 110. Vide post, (E).

So, in all cases a power coupled with an interest may be assigned; as a power to a lessor and his assigns to cut down trees. R. 2 Mod. 317.

But a man cannot annex a power of revocation to a feoffment, or grant; for that will be void. Co. L. 237. a. Mo. 610. Vide Uses, L. 2. &c.)

So, if a man, seized in fee, covenant to stand seized to the use of himself for life, with power to make leases, remainder to another in fee, the power is not well raised. Ca. Ch. 161. If the consideration of the

the covenant does not extend to the power to make leases. R. Mo. 145. 1 Co. 175. R. Ray. 248.

So, upon such covenant he cannot reserve a power to make leases, jointures, or for preferment of younger children, &c. Mo. 381. 383.

(A 2.) By what words.

Words, which show the intent of the party, are sufficient to create a power; as if a power be to demise or lease, though the intent is, that he declare the uses of the first settlement for life, or years: for the lease does not take effect by demise, but by declaration of the uses. Mo. 611. Vide Uses, (L 3.)

[If a man having an annuity in fee (issuing out of the four and half *per cent.* duty at Barbadoes) directs his executors to entail on his daughter and her issue, all his estate and effects; this, though it passes no interest to them, and though they take nothing as executors, yet it gives them power to convey. 2 Vezey, 170.]

So, if a man expresses the power only by implication, it is well; as, provided that he shall not have power to alien, &c. otherwise than to make a jointure, and leases for 21 years; it is a good power to make a jointure, and leases. 1 Leo. 148.

So, if a devise be to A. for life, to set, let, and make estates out of it as I might, and afterwards to his daughter in tail; A. has a power to make leases, it being the custom of the country where the land lies, to let for lives or years. R. 2 Rol. 261. l. 35.

[But if lands are settled (by act of parliament) with a clause to restrain alienations, except for the jointures of wives for term of life, &c. a power for such jointress to lease her jointure-lands for three lives, or years determinable on three lives, cannot be implied, though it is the usual way of leasing in that country. 3 B. M. 1259.]

But a power being executory, may be restrained or enlarged by a subsequent deed; as if a power be general, to revoke; by a covenant afterwards, that he will not revoke without the consent of B., the power is restrained. R. Jon. 411.

So, if the consideration, upon which the power was founded, does not extend to the person, to whom the lease is made, the lease shall be void; as if a man covenant, in consideration of natural affection, to stand seized to the use of himself for life, &c. with power to make leases, &c. a lease to a stranger is void; for he is not within the consideration. 2 Rol. 260. l. 30. Vide Covenant, (G 5.)

So, if a power, at its creation, be to make leases to a person, to whom the consideration does not extend, it will be void, though the lease be executed to a person within the consideration. 2 Rol. 260. l. 35.

[A power of the jointress to make leases not being expressed, cannot be implied under a private act of parliament. 3 Bur. 1259.]

[A power annexed to a devise in fee to a married woman, that she may dispose of the estate without the controul of her husband, is void. 1 B. & P. 192.]

## (B) How it shall be expounded.

## [(B 1. a.) General rules.]

[Powers are to be construed in the same manner in a court of law as in equity. Dougl. 293.]

[In the construction of powers, the intention is the governing principle. 3 T. R. 665. 4 T. R. 743.]

[In the execution of powers, the material object to be attended to is the intention of the person creating the power; and that intention is to be collected from the words of the will, or other instrument, giving the power, according to the ordinary and common acceptation of the words, and not according to any legal or technical exposition of them. 4 T. R. 748, 749.]

[Powers are to be carried into effect according to the intention of those who created them; and in ascertaining what that intention was, the circumstances of the case (nothing opposing) may be used as an assisting medium. Thus, where A. seized in fee of W., X., and Y. closes; whereof X. and Y. had been anciently and usually demised, but W. had not; devised to trustees limited to certain executory uses, with power to the trustees during the minorities of those to whom the premises might descend under the limitations, and to any tenant for life, to grant any lease of all or any part of the lands, so as upon such lease there be reserved the ancient and accustomed rent usually paid for the same; it was held, that the power only extended to X. and Y. closes; since that it never could have been the devisors's intention that the trustees who might have an interest for a day only, and who, were not intended to have any beneficial interest for themselves, should be able to alter the nature of the property, and present the *cestuique* use from occupying what the devisor had always reserved for his own occupation. 3 M. and S. 99.]

[Where two intentions are expressed, a general and a particular one, and the particular intent cannot take effect, the words shall be so construed as to give effect to the general intent. Hence, where an estate was limited to A., on his marriage, for life, with power to appoint amongst the children of the marriage for such estates as he chose, who by his will appointed to his son B. for life, remainder to the first and other sons of B.; and, in default of such issue, then to his son C., it was held that B. took an estate tail, the general intent being that his issue should inherit, and the particular limitation expressed being void. 2 T. R. 241. 380. 781.]

[The execution of a power in the form prescribed, is a condition precedent, by the observance of which alone, the right by virtue of the power can arise. If, therefore, a power to lease under the usual covenants be given, and a lease be made, in which there is an unusual covenant, the lease is void *in toto*, and cannot be avoided as to that covenant only. 1 T. R. 705.]

[Where a qualification annexed to a power, goes in destruction of the power, the law will dispense with the qualification. Dougl. 574.]

[A power to lease for years is to be construed liberally. 3 Burr. 1441. 1 Blk. 446.]

[A custom

[A custom of the country, directly contrary to a leasing power, cannot be engrafted upon it. 2 East, 376.]

[An appointment by deed cannot be construed *cy pres.* *Secus* if by will. 1 East, 442.]

(B 1. b.) To make leases in possession or reversion.

A power shall be expounded strictly.

[1 Bl. Rep. 283. In the construction of powers originally equitable, the courts of law ought to follow equity; but if they are originally legal, the courts of equity ought to follow the law. 1 Bl. Rep. 283. Cowp. 266. Doug. 293. (280.)]

And therefore if a man has power to make leases generally, this extends to make leases in possession only, and not in reversion. R. 2 Rol. 261. 1. 5. 2 Cro. 318. Yel. 222. R. Ray. 248. R. M. 9. W. 3. in B. R. inter Winter and Loveday. (1 Ld. Ray. 267. 2 Sal. 537.) 1 Lev. 168. R. 6 Co. 93. a. Mo. 199. Semb. 1 Leo. 35. 3 Leo. 131.

Nor a lease to commence *in futuro*. R. Ray. 248. Semb. 1 Leo. 35. R. Yel. 222. 2 Cro. 318. Mo. 494.

[A lease to commence from the day of the date is good, under a power to grant leases in possession only, and not in reversion. Cowp. 714. Doug. 53. n.]

[Though the *habendum* in a lease by deed is prospective from the date, yet is the lease in possession, if not executed until or after the day in the *habendum*. 10 East, 427.]

So, if the power be to make leases for two or three lives, he cannot make a lease to one not *in esse*; as to the son of B. not born, &c. Per Windh. Ray. 163.

So, if the power be to make leases in possession, he cannot make a lease of land in reversion, though it be to commence *in presenti*. R. 1 Sid. 101. Ca. Ch. 18.

[But though a subsisting lease cannot be proved to have been surrendered, yet if the new lease has been uniformly acted under, a surrender of the first shall be presumed, and the second be considered as a lease in possession. Ambler, 748.]

[Where tenant for life has a power to grant leases "in possession, but not by way of reversion or future interest," a lease *per verba de presenti* is not contrary to the power, though the estate at the time of making the lease was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. Doug. 565.]

So, if part of the lease be in reversion, the whole lease shall be void. 3 Sal. 276. (Allan v. Calvert, B. R. E. 42 Geo. 3. 2 East. 376.)

So, if the power be to make leases in possession, or in reversion, he cannot make a lease in possession, and another lease of the same land in reversion; but his power to lease in reversion extends only to make leases of the land, which was not then in possession. Per Holt, M. 9 W. 3. inter Winter and Loveday. (1 Ld. Ray. 269. Sal. 537.)

So, a power to make leases in reversion does not warrant a lease to commence at a future day, but only a lease to commence at the end of an estate then *in esse*. Per Holt, M. 9 W. 3. (1 Ld. Ray. 269. 2 Sal. 537.)

So, a power to make a lease for three lives or thirty years in possession, or for two lives or thirty years in reversion, warrants only a concurrent lease for two lives; for a lease for lives cannot commence at a future day. Per Holt, M. 9 W. 3. inter Winter and Loveday. (1 Ld. Ray. 269. 2 Sal. 537.)

[Under a power in a will to lease in possession and not in reversion, a lease for years executed the 29th March to the then tenant in possession, *habendum* as to the arable from the 15th February preceding, and as to the pasture from the 5th April then next is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power. 2 East 376.]

But if a power be annexed to the estate of him in reversion, to make leases generally, he may make a lease *in presenti* of the reversion. R. 1 Lev. 168.

Though the power be to make leases in possession. Dub. Ca. Ch. 18. Acc. per Keeling, but two J. cont. 1 Lev. 168. and it was admitted cont. 1 Sid. 260, 261.

So, if a fine be to the conusee for fifteen years, afterwards to B. for life, &c. with power to lease for three lives, or twenty-one years in possession; he may make a lease during the fifteen years, of land in lease at the time of the fine, when such lease expires. Per Coke, 2 Rol. 260. l. 50. 2 Cro. 347. 2 Bul. 216. 1 Rol. 12.

So, if husband and wife lease pursuant to the st. 32 H. 8. and then, by act of parliament, the estate is settled to the husband for life, with power to lease for three lives or twenty-one years; he may make leases of the reversion during the first lease by husband and wife. 2 Rol. 261. l. 15. Semb. 1 Leo. 36. Per two J. Monson. cont. Dy. 357. a.

So, if a power be to make leases in reversion for three lives, &c. he may lease for three lives, when there is another life *in esse*, though the power does not say, to make leases of the reversion; for there is no prejudice. R. 2 Rol. 261. l. 30.

So, he may make a lease for years determinable upon three lives, to commence after the end of the former lease *in esse*. R. 8 Co. 70.

[The intent of the parties who gave the powers, ought to govern every construction of them. 1 B. M. 60. 120. Dougl. 573. 3 T. R. 665.]

[The plan of the power to make leases, is for the mutual advantage of possessor and successor. 1 B. M. 60.]

[A man devises lands to trustees for payment of debts, then in trust for A. for life, then to his first and other sons, then to B. for life, then to his first and other sons, then to C. &c., in like manner remainder to his own right heirs, with a power to trustees to raise money for debts, by letting leases for thirty-one years, in possession and reversion, and after debts paid, whoever should be seised might make thirty-one years lease. B. dies in deviser's life, who makes codicil, declaring his will should remain, in all but the particulars expressed; and gives part of his lands to A. for life, with remainders over, with such powers as by his will devised; and gives other lands to D. (the son of B.) for life, then to his first and other sons, then to his daughters, then to A. (who is deviser's brother) for life, then to his first and other sons, remainder to such persons and with such powers, as his other estate devised to him

is

is appointed to go. D. has a power to grant thirty-one years' leases. (On error, from Ireland.) Str. 962.]

(B 2.) Of lands usually demised.

So, if a power be to make leases of lands usually demised, he cannot lease land only once demised. 2 Rol. 262. l. 2. R. Vau. 33. Vide Estates, (B 32.— G 4, 5.)

Though it was demised from year to year, for so many years, or for three lives: for it was but one single contract. R. 2 Rol 262. l. 3.

If a power be, to lease all or any of the premises, which at any time heretofore have been usually letten, reserving the rents now paid, or more; a demise of lands, not leased within twenty years, is not within the power, though demised. Temp. Eliz. R. Vau. 33.

If a power be to lease, rendering the ancient rent, he cannot lease lands, never demised; for no ancient rent can be reserved. R. Mo. 198. Per Vau. 35. R. 2 Mod. Ca. 250. 381.

But he may lease lands demised two or three times. R. 2 Rol. 261. l. 50. Vau. 33.

[Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes which had never been let before was held void. 3 T. R. 665.]

[Land settled in a family settlement for a term determinable on lives, shall so far be esteemed lands usually letten or demised. 1 Bl. Rep. 446.]

[A power to lease for one, two, or three lives, such lands as were then demised for any such term, applies to such lands only as the lives on which they are held are certain and co-existing. 7 T. R. 718.]

[Under a power "to lease all manors, messuages, lands, &c. so as there be reserved as much rent as is now paid for the same," such parts of the estates enumerated in the power, as have never been demised, may be let. Doug. 565.]

[But in a family settlement of an estate consisting of some ground always occupied with the family seat, and of lands let to tenants on rents reserved, the qualification annexed to the power of leasing, "that the ancient rent must be reserved," excludes the mansion-house and lands about it never let. Id. 574.]

[Settlement of lands to the use of husband for life, then to the wife for life, proviso, that they, during their joint lives, and the survivor in possession, may make leases of premises, at the yearly rents the same are now let at. The wife marries second husband, and they demise the capital mansion-house and demesne lands, never before leased. R. per B. R. that this is a void lease; and *dubatur*, whether she could lease on her second marriage. Fort. 392.]

So, if a power be to make leases, so that he do not lease the demesne lands of the manor, he cannot make leases of copyholds; for they are part of the demesnes. Per three J. inter Winter and Loveday: Rookby cont. for it seemed to him, that the exception extends only to lands in his own occupation. Sal. 537. (1 Ld. Raym. 269.)

But a lease may be of the rents or services of a manor; for they are not part of the demesnes. Per Holt, inter Winter and Loveday. (1 Ld. Raym. 270. Sal. 538.)

## (B 3.) Where the ancient rent is or is to be reserved.

So, if a power be to make leases, so that the ancient rent be reserved, if he does not reserve the ancient rent, the lease will be void. Vide post, (C 6.)

And therefore if he, not having counterparts of the ancient leases, leased all his lands anciently demised, rendering the ancient rents, without mentioning what lands, and what rents, in particular; it will be void. Per Cowper and Trevor, Holt, cont. 2 Ver. 534. 544. Eq. Ca. 14, 15. (2d part of 2 Mod. Ca.)

But if a power be to lease the premises, or any part of them, so that such rent or more be reserved, as was paid within two years before; he may lease lands not demised *omnino*, reserving such rent as he pleases; for the intent appears, that all may be demised. R. 2 Rol. 262. l. 10.

So, if a power be to lease the premises, (which consist of land, a rectory, &c.) or any part of them, reserving so much per acre; he may demise the rectory, though there cannot be a reservation of such a sum per acre. R. 1 Vent. 294. 2 Lev. 150.

If a power be to demise, rendering 12s. per ann.; a lease rendering so much as ought to be paid by the power, without saying how much, will be good. R. 2 Ver. 533.

If a power be to make leases, rendering such rent as he pleases; a lease without rent will be good. R. Skin. 427, 428.

If a lease by tenant for life reserves the rent to him and his heirs, it will be good. R. 8 Co. 70. b.

If a lease be of such land *inter alia*, reserving the ancient rent *proinde*, the word *proinde* shall be referred to the land mentioned. R. 1 Vent. 840.

[The successor must not be prejudiced in point of remedy, or any circumstance of full enjoyment. 1 B. M. 60.]

[If the ancient rent is to be reserved, it must be with all beneficial circumstances; and *specifically*, that remainder-man be put to no difficulty in avowing; otherwise void against him, though good against owner of the inheritance. Ibid.]

The lease intended by every power of leasing, is the usual husbandry lease, reserving a rack-rent. Ibid.

[Where a power of leasing at the usual rent is granted, the term "usual," means the rent at which the property had been before letten, not the rent at which property of that description usually lets in the neighbourhood. Hence, where A. devised a reversion, expectant on the death of B., with power to the devisee to grant leases, so as there shall be reserved thereon the "usual or other the most rent" that can be had for the same; and the devisee let the premises at a rent exceeding that at which the party in possession had leased them at the time of A.'s death, but inferior to their real value (having taken a fine upon the lease); it was held, that the power of leasing was well executed. 4 M. & S. 371.]

[The least of two offers may be the best rent that can be obtained within the meaning of a leasing power, since regard may be paid to the qualifications of the tenant. 10 East, 278.]

[A power

[A power to lease stipulates that the best rent shall be reserved, without taking any sum of money or other thing for or in lieu of a fine or income for the same. Under this power a lease is granted in October, to be computed from March preceding, rent payable half-yearly in March and November, first payment to be made in November next. Held, that this was not taking a fine, since it was apparent that there had been an actual occupation since March. But, *semble*, the fact, that there had not, might have been averred. 3 M. & S. 382.]

(B 4.) For lives, or years.

If the power be to make leases for three lives, or 21 years, he cannot make a lease for 99 years, if three lives so long live; for the power shall be taken strictly. R. 8 Co. 70. b. 2 Rol. 260. l. 40.

But a power to make leases, not exceeding three lives or 21 years, warrants a lease for years, if three lives so long live: for that does not exceed three lives. R. 8 Co. 70. b. 2 Rol. 260. l. 45.

So, a power to make leases for three lives, or 21 years, or for any term upon one, two, or three lives. R. 3 Mod. 269.

So, a power to make leases for three lives, or for 30 years, or for any number of years determinable upon three lives, warrants a lease for 30 years absolute; for the repetition of the words [*or for*] makes distinct clauses. Per three J. Rockby cont. Winter and Loveday. Sal. 537. (1 Ld. Ray. 269.)

If a power be to make leases, rendering the rent now paid, or more, for 21 years, or for years determinable upon one, two, or three lives in possession, so long as the lessees duly pay the rents and perform the conditions; that clause is a limitation, which determines the lease, if the rent, &c. be not paid, though there be no demand of the rent. R. Vau. 32.

[If tenant for life in possession has a power to limit lands to his wife for life, he cannot make a lease of them for 99 years determinable on her death. Str. 992.]

[Under a power of leasing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such lands as were then demised for any such term, lands are not included which were then held under a demise "to W. and G. for 99 years, if W. and his widow and any eldest son living or *in ventre sa mere* at the time of his (W.'s) death, or if no son, any eldest daughter then living or *in ventre sa mere*, or any or either of those three, viz. of the said W. and such his wife, son, or daughter should so long live, remainder to the said G. and his widow, son or daughter in the same manner;" of which description of persons five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under the lease. Under such a general power the three lives must be certain and co-existing. 7 T. R. 713.]

[A power to lease for any term not exceeding 21 years or three lives, so as no greater estate than for three lives be in being, does not warrant a lease for 99 years, determinable upon three lives. 10 East, 158.]

[A power to lease for a certain period warrants a lease for a shorter time. Thus under a power to lease for 21 years, the lease may be for

14. The power of leasing is given for the benefit of the lessor ; now every one may renounce a benefit in all or in part. 3 M. and S. 382.]

[(B 5.) Miscellaneous.]

[A case in which the question was, as to a devisor's intention in granting a power of renewal, by adding a life in an estate. 10 East, 549.]

[A power of leasing, which stipulates against giving leave to the tenant to commit waste, does not prohibit the landlord covenanting to repair. 11 East, 305.]

[A power under a marriage-settlement to appoint to the children of the marriage, is strictly confined to those children. 2 Wils. 369.]

[If there be a power under a marriage-settlement, to give to the children of the marriage, in such shares, &c. and for such estate, &c. and there is but one child of the marriage, such child must have the whole estate which was settled. 2 Wils. 336.]

[A power to appoint to children, extends to grandchildren, where the children were in being when the power was created. 2 T. R. 244. *Secus*, where they are not in being. 2 T. R. 241.]

[A power given to appoint to children may extend to grandchildren if an intention to that effect can be made out. 4 T. R. 741.]

[Under a devise to testator's wife, remainder to his children, subject to her appointment; a child born in the testator's life-time, but after making the will, is an object of the appointment. 1 Taunt. 289.]

[A. having a power to limit an estate to the use of such child or children of the said A., and for such estate or estates as she should direct, &c. and having two daughters, as to one moiety of the said estate, appoints it to the use of her eldest daughter B. for life, with remainder to the first and other sons of her said daughter in tail male, remainder to the daughters of the said B. in tail general, remainder to her youngest daughter C. for life, with remainder to her first and other sons, &c. remainder to the daughters of the said C. in like manner, remainder to the right heirs of the eldest daughter B., and so *vice versa* as to the other moiety. Held, that such appointment is an excess of A.'s power, as far as respects the limitation to her grandchildren, but good as to the limitation to her daughter's for life. Cowp. 651.]

[In a marriage-settlement there is a power of appointing a real estate to such child and children of the marriage; for such estate and estates as the husband should direct. And for want of such appointment, the estate was settled upon all and every the child and children of the marriage equally. Held that the appointment might be to one child in exclusion of the rest, "such child," is an expression applicable to one of several children. 1 T. R. 432.]

[An exclusive appointment under a power of appointing "to and amongst such of his relations," &c. is good. 1 T. R. 435.]

[An estate being conveyed by a marriage-settlement to trustees to the use of the latter, the husband for life, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, and the settlor having granted an estate for his own life, for valuable consideration in the settled estate, a revocation, subsequent thereto, of all the uses executed by him with  
consent

consent of the trustees, and a conveyance of the estate to a purchaser for valuable consideration also, but with notice of the prior grant for the settlor's life, shall not affect the interest granted for his life. Dougl. 477.]

[A power given an executrix by that name to charge the testator's estate, only applies to that portion of it which comes to her as executrix; namely, the personal estate even though she be trustee of the real. 3 T. R. 721.]

[An estate is limited to uses, and a power given to revoke those uses by selling and conveying the estate to a purchaser, so that the purchase-money should be paid into the hands of A. and not of B., to be laid out in lands, to be settled to like uses. Held, that the powers of revocation was conditional only, upon payment of the purchase-money in the manner directed.. 4 T. R. 39.]

A. devised lands to his wife B. for life, with a power of appointment to such his child or children, (of whom there were three then alive), in such manner, share, and proportion as she should direct, "but so as the said lands which were to be considered as one estate, should not be divided, but transmitted whole and entire to his heirs and family" and in default of appointment, remainder to his own right heirs. Query, whether B. has the power of appointing beyond a life-estate, since otherwise the estate could not be transmitted whole and entire, &c. But, supposing she has, then per Lord Kenyon, C. J. and Grose, J. the power must be exhausted on the children, and therefore that a limitation to grandchildren in tail, after an estate for life to a child, was void; however, that B.'s general intention being that the grandchildren should inherit, the child took an estate-tail; per Ashhurst J. and Buller, J. the word, children is co-extensive with issue, so that the limitation to the grandchildren was good, and the child took for life only. 4 T. R. 737.]

[Where real and personal property are bequeathed to A., subject to a power of appointing the same unto B. and C. in such proportions as he should think proper, the power is well executed, though the personalty (or a portion of it) is appointed to one, and the realty to the other. 1 Taunt. 289.]

[A. devises a copyhold estate to trustees, to the use of B. for her life; then to such uses as B. by her last will should appoint; and in default of such appointment to the right heirs of B. A. dies; the trustees are admitted in fee on the trusts declared by the will. B. by an appointment, in form of a deed poll in nature of a will, irrevocably devises all her interest in the premises to C. and declares that no subsequent will should revoke this disposition; the premises are surrendered to the use of C. in reversion, and he is admitted accordingly. B. by another will, afterwards devises the premises to D. and his heirs, so as not to be subject to any of her debts, contracts, or engagements; under this will D. was admitted, and soon afterwards B. died. Held, that by the devise to D., the former appointment in favour of C. was revoked, and the legal estate divested out of the trustees under A.'s will, and vested in D.; and that a surrender to D. by the trustees, was as effectual as if it had been made by B. 1 Mars. 90. 5 Taunt. 382.]

[A. devises, after certain legacies, "all the residue of what he dies possessed of, or in expectancy, to his wife B. for her life, reserving to her

her full power to will away any part or proportion of his said residue at her decease; and after that period to his daughter." A. dies, and B. devises away the whole of her property. Held, that this was a good execution of the power. 2 Mars. 421. 7 Taunt. 122.]

### (C) How it shall be executed.

#### [(C 1. a.) General rules.]

[A power has this effect and no more, it authorises the grantee to do something on behalf of the grantor. Under it therefore the grantee can do nothing but what the grantor might himself have done. Hence, too the execution of the power only calls into action an estate which though hitherto dormant, was existing in the power itself. Hence, the appointee claims under the power, and the appointment. And hence the appointment cannot be of an estate, which, had it been expressly limited by the power itself, would have been void.]

[Powers must be strictly pursued; a lease, therefore, by tenant for life, with power to lease in possession and not in reversion, reserving three-fourths of the best yearly rent that could be obtained, is void against the remainder-man, if either essential is wanting. 5 T. R. 567.]

[In the execution of a power, in order that the deficiency of one instrument may be supplied by the sufficiency of another, it must appear that the party intended that they should operate conjointly. 3 East, 410.]

[A power to make a life estate to the wife, may be executed at different times. 2 Burr. 1196. 1 Blk. 281.]

#### (C 1. b.) What shall be a good execution:—Though more join in the execution than need.

If a power be to a woman to make leases, and she takes husband, a lease by the husband and wife, is well executed. R. 1 Sid. 101. R. cont. Ca. Ch. 18. R. acc. 1 Rol. 329. l. 35. Acc. where it is a naked power. 3 Salk. 276. Vide Chancery, (4 H 1, &c.) — Uses, (L. 4, 5.)

So, if an use be to A. for life, and afterwards to B. his son, in tail, with a power for A. to charge the land with 2000*l.* for portions; if A. and B. by deed charge, &c. it will be good. R. 1 Lev. 150.

#### (C 2.) Or more be done than the power requires.

So, if a man who has a power, does all required by his power, and more, it will be good for so much as was within his power; as if a tenant for life, who has a power to make a jointure, covenants to stand seized to the use of him and his wife for their lives, and then to the issue of their bodies; it is a good execution of the power to make a jointure. R. 2 Lev. 60. Dub. 1 Leo. 148.

[So, where A., having a power to limit an estate to the use of such child or children of the said A. and for such estate or estates as she should direct, limit, &c. and having two daughters, as to one moiety of the said estate, appointed it to the use of her eldest daughter B. for life, with remainder to first and other sons of B. in tail male, &c. remainder to her younger daughter C. for life; remainder to first and other sons of C. &c.; and *vice versâ* as to the other moiety. This appointment, though an excess of A.'s power with respect to the limitation

ation to her grandchildren, was held good as to the limitation to her daughters for life. Cowp. 651. 657.]

[So, where by marriage-articles the husband had power of appointment to any one or more children of the marriage, and by deed of appointment in which his eldest son joined, he appointed part of his estate to his eldest son and his issue, and it was held good; for he might have appointed absolutely to his eldest son, and the latter, on its being so appointed, might have immediately afterwards settled it in that manner. Ambler, 289.]

[But where the son does not join, an appointment to him for life, remainder to his sons in tail, under a power of appointing among children, is not a good execution of the power. 2 Brown. 22. 344. Vide S. C. 2 Term Rep. 241. 380. 781. 2 Brown. 51.]

[If a man has power to appoint lands to his wife for her natural life, and he by deed grants them to trustees, for the use of his wife for life, and then to the use of the heirs of her body, the deed is void to raise any use, but it shall enure as an appointment. 2 Fort. 339.]

[If a man having power to make leases for ten years, leases for twenty years, it will be good in equity for ten years. R. Ca. Ch. 23. Semb. cont. per Raymond, Ch. J.]

[So, where tenant for life had power to let leases for 21 years in possession, and he made a lease for 26 years without referring to the power; it was held that the first lease should be presumed to have been surrendered, and the remainder-man should be bound for 21 years of the new lease. Ambler, 740.]

(C 3.) Or if it be done by more deeds.

So, if a man pursues all the requisites within his power, though he does it by more deeds than are necessary, it will be good; as, if a man has a power to charge land with 2000*l.* by his deed, for portions, &c. if he makes the charge by lease and release, it will be good, though the power says, by deed, and it be executed by two deeds. R. 1 Lev. 150. Hard. 395.

[A power to make provision for younger children by deed, may be executed by will. Ambl. 64.]

[If done by deed, to declare the uses of a fine, and a fine pursuant. R. 1 Vent. 279. Ray. 239. 2 Lev. 149.]

[But where a wife under a marriage-agreement had power to dispose of her estate by deed or will after her decease, and the husband covenanted to confirm it; afterwards the wife, by lease and release, reciting the articles, conveyed her estate to trustees after her death to the use of her natural son for life, with remainder over. Afterwards the husband and wife levied a fine of the premises, and declared the uses different from those of the release; it was held that the lease and release were not good to pass the estate either as a conveyance or as an execution of a power, and that the estate passed by the fine. Ambler, 467, 468. But it is said, this was decided on the principle that there was no meritorious consideration. Ambl. 474.]

[For, in favour of a person, having a meritorious consideration, it was afterwards determined, that where a woman by marriage articles reserved to herself a power of disposing of her present or any future estate real or personal,

personal, by deed or will, and she devised an estate which was in trustees this was held a good execution of the power. Id. 468.]

[So, where the legal estate was in the wife, such a power was held to be well executed by devise. Id. 565.]

[So, the execution of a power may be without deed, where that is not expressly required; for the interest arises out of the estate. R. Sal. 467.]

[If a man has a power to appoint to a wife for her life, for or in the name or in lieu of jointure, all or any part of lands, it is not necessary it should be executed all at once. 2 B. M. 1136. 1 Bl. Rep. 281.]

[If, previous to his marriage, he by indenture doth according to the power to him given, and by virtue thereof, and of all and every other power, appoint to trustees part of the lands to the use of his wife for life, for and in the name and in lieu of jointure, and there is a proviso, that if she does not on three months' request release her dower, this to be void; which proviso he releases, he may appoint other part of the lands as augmentation of jointure. Ibid.]

[An appointment, when executed, is to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created. 7 T. R. 342. 438.]

[A power may be executed at different times, if not fully executed at the first, provided the execution in the whole does not transgress the limits of the power. 2 T. R. 721.]

(C 4.) Or if it be executed without mentioning his power.

So, if a man executes a power by deed without taking notice of his power, it will be good, where the deed has no operation, if it be not in execution of his power; as if a man settles two parts of his land, and afterwards makes a feoffment of the third part held *in capite*, to the use of such person, &c. as he shall appoint by his will, and afterwards devises that third part, without reference to the feoffment; it will be a good declaration of the uses of the feoffment, for otherwise, the devise will be void, two parts being settled before. R. 6 Co. 18. a.

So, if a man has a power to charge lands with the payment of 2000*l.* and he, being tenant for life, with his son tenant in tail, by lease and release, without reference to the power, conveys the land for raising of the money, it will be good. R. 1 Lev. 151. cont. per Bridgman, afterwards in Chancery. 2 Leo. 152. in marg.

So, if the deed has not a full operation, except where it is in execution of his power; as, if tenant for life makes a lease, without taking notice of his power, it shall be an execution of his power to make leases; for otherwise the lease will not have an effectual continuance. R. 1. Vent. 228. [Vid. Ambler, 740.]

If a devisee for life has power to sell the reversion, and he sells by bargain and sale inrolled, without taking notice of the power; it shall be an execution of the power; for otherwise, nothing would pass but his estate for life. R. 1 Rol. 329. l. 45. Jon. 327.

[But where a testator having a power over 3000*l.* originally the property of his wife, gave several legacies; and then, after the decease of his wife, gave the residue over, and his estate was not sufficient to pay the legacies; yet it was held that the will was no execution of the power, the same not being referred to, and there not being any thing

thing by which an intention appeared in the testator to execute it. 2 Brown. 297.]

[An express reference to the authority on executing it, may aid what would otherwise be an imperfect execution. 2 N. R. 1.]

(C 5.) If it be executed by conveyance tantamount, though not pursuant to the letter of the power.

So, if a man, who has a power, does not observe all circumstances required by law, for making such estate, yet it may be a good execution of his power; for the estate made by virtue of the power, arises out of the first estate upon which the power was created; as, if tenant for life, with power to make a jointure, covenant to stand seised to the use of his wife, it will be a good jointure. Ray. 239.

If tenant for life, who has a power to make leases for lives, makes a lease for life without livery, it is good, and better than if there was livery. Per Hale, 1 Vent. 281. 2 Lev. 149.

So, it is good, if there be also livery. 1 Vent. 281. 2 Lev. 149.

[A power to make leases for years determinable on lives, may be executed by a covenant to stand seised. 3 B. M. 1441.]

If a man has a power to make an estate to his children, and he grants a rent-charge to them, by his will, out of the same estate, it will be good. R. 3 Ca. Ch. 69.

If he has power to make it by writing, signed before two witnesses, and he grants a rent by his will, executed before two witnesses; though it be not a good execution of the will, for want of three witnesses, within the st. 29 Car. 2. yet it shall take effect as an execution of the power. R. 3 Ca. Ch. 69.

If an executor, who has only power to sell, makes a feoffment, it will be a good execution of the power. 1 Rol. 330. l. 1.

If a wife has power to dispose by writing under hand and seal; by writing in nature of a will, signed and sealed, will be good. R. Cro. Car. 376.

So, if it be by writing under hand and seal delivered in the presence of three witnesses; by will signed, sealed, and published, before three witnesses, is sufficient, though delivery is required by the power. Hob. 312. 1 Vent. 280.

[A power to appoint by deed executed in the presence of two witnesses is ill executed by a will; otherwise if the power be to appoint by any writing or instrument, or other general term. Cowp. 260.]

[If a power to be executed by deed attested by three witnesses be executed in consideration of marriage, by deed attested by two witnesses only; this defect in the execution of the power, shall be supplied by a court of equity. 1 Brown. 363.]

[A will under a power, not attested to pass real estate, is a good execution of the power as to the personalty. Id. 147.]

[If a *feme covert*, having a power to dispose of 300*l.* by will, signed and sealed by her, make a testamentary paper, not sealed but on a stamp; this is equivalent to sealing, and is a good execution of the power. 2 Brown. 585.]

[A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens, (of whom there were eleven,) and in case of their neglect in appointing, then to devolve to two corporate bodies

bodies in succession, and to result in the dernier resort to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a majority of the churchwardens; especially if such election be supported by usage. 6 T. R. 388.]

[Where powers, not merely private, are to be exercised by many; provided a sufficient number be assembled, the act of the majority binds the minority, and becomes the act of the whole body. 1 B. & P. 229.]

[A common-law power to appoint by deed, executed in the presence of two witnesses, cannot be executed by will. *Secus*, had the power been to appoint by any writing or instrument, or other general term. Cowp. 260.]

[A mere devise of the residue will not operate as an execution of a power of appointment by a will. 2 H. Bl. 136.]

[A devise of property as his own, in which the testator has no interest to bequeath, but only a power of appointment is a good execution of the power; *secus*, if he has a devisable interest, since then the devise will operate on the interest and on that only. 1 Taunt. 289.]

#### (C 6.) What not.

But a power ought to be strictly pursued; and therefore, if all circumstances are not observed, it will be a void execution of it; as if a power be to make leases, rendering the ancient rent, a lease which does not reserve it, will be void; as if he leases two acres with other land, and reserves the rent of the two acres for the whole. R. 2 Jon. 111. Vide ante, (B 3.) — Estates, (G 5.)

[The lease of a tenant for life with power of leasing under certain conditions must strictly comply with those conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. 5 T. R. 567.]

[A tenant for life, having power to grant building-leases for 61 years reserving the best improved ground-rent, granted a lease for that term, which was not expressed to be a building-lease, but which contained a covenant by the lessee to keep in repair the premises demised, (old houses,) or such other houses as should be built during the term; and it was holden that this was not a building-lease within the power. Willes, 169.]

[Such a lease, being void, was incapable of being confirmed by the remainder-man's acceptance of rent. Ibid.]

[Where the power is only to revoke, no uses can be declared under that power, though the party might have done it by a new conveyance, or by new grant or covenant on consideration, in the same. Str. 584.]

[If A. surrenders copyhold to trustees to the use of his wife for his life, then to pay the profits to his children equally, then to such uses as he shall appoint, and for want of appointment to B., and by his will gives all the rest of his estate, real and personal, of what nature, kind and quality whatsoever, to C. in bar of what he may claim by custom or otherwise; it is not a good execution; for though he need not recite the power, he must mention the estate. Semb. 1 Atkyns, 559.]

So, if a power be to revoke under hand and seal, a revocation under seal only is not sufficient. Pal. 112.

[If A. devises the income and produce of 1000*l.* South-Sea stock to B. for life, with a power to dispose of 400*l.* of it by writing before three witnesses, and for want of appointment gives the 400*l.* to a charity, and B. makes his will, and after legacies gives the rest and residue of his personal estate to, &c.; this is not a good execution of the power; and parol evidence shall not be allowed to prove that B. intended the 400*l.* should pass. 1 Akyns; 568.]

[If a wife has a power by settlement before marriage to appoint money by her will in writing, or other writing under hand and seal, attested by two witnesses, and dies, leaving a paper in her handwriting, but not signed, sealed, nor attested; this is not a good execution. 3 Atkyns, 156.]

So, if a man has a power to charge 2000*l.* upon land, and he, by lease and release, conveys in fee, upon condition to be void, upon payment of 2000*l.* and interest; it shall be void for the whole: for he had not authority to raise more than 2000*l.*, and it shall not be good for part, and void for the residue at law; for the power is intire, and so ought to be the execution of it. R. 1 Lev. 151. Hard. 398. Cont. R. Sal. 538.

[If A. in his son B.'s marriage-settlement covenants to stand seized, after other remainders, to the use of children of the marriage, in such manner, for such estates in fee or tail, and upon such conditions as B. shall appoint, and in default, &c. over; and B. by will appoints to his eldest son C. and the heirs of his body for ever, and for want of such issue, to the right heirs of B. this is a void appointment; for he has not appointed the whole among the children of the marriage, giving only estate-tail to C. and the fee to his own right heirs, who might not be children of that marriage, and the contingent remainder to such children is not defeated. 2 Wils. 369.]

If he has power to make a lease for 31 years for raising portions, and he makes a bargain and sale in fee. Semb. Hard. 413.

[A devise of an estate to A. during her life, and at her disposal afterwards, to leave it to whom she pleases; the appointment can be only by will. 10 East, 438.]

But if a man, having a power of revocation, makes a mortgage in fee; it shall be a revocation for the mortgage only. 1 Ver. 141. 182.

[Powers shall not be exceeded, nor their conditions evaded, but shall be strictly pursued in form and in substance, and all acts done under a special authority, not agreeable to it; nor warranted by it, are void. Vid. Doug. 565—575.]

[It is no lease, unless landlord and tenant are bound in mutual stipulations. Ibid.]

[If the lessee never executed counterpart, nor entered, nor covenanted to pay rent, nor consented, nor accepted lease, nor was in possession of it, he never was bound by it, and such lease is no execution of a power, especially if there is no clause of re-entry. Ibid.]

[Every fraudulent, unfair, prejudicial execution of a power in respect of those in remainder is void. Ibid.]

[But it is good, though made in trust for him who executes the power, provided the legal tenant be bound in all requisite covenants and conditions. Ibid.]

[Under a power to a tenant for life to lease for years, reserving the usual

usual covenants, &c. a lease made by him, containing a proviso, that in case the premises were blown down or burned the lessor should rebuild, otherwise the rent should cease, is void; if the jury find that such covenant is unusual. 1 Term Rep. 705.]

[If one who has a power to jointure, execute it to the full extent; but it be agreed that the wife shall have only a part by the year, and that the rest of the rents shall go to pay his debts, and then as he shall appoint; this will be fraudulent against the remainder-man, except as to the part actually given to the wife. Ambler, 233.]

[So, if an estate be settled after the death of father and mother, on such child, as the father, with the consent of trustees, shall appoint; and on default, then on the first, &c. sons; if the father by misrepresentation prevail on the trustees to consent to his appointing to his younger son, the appointment will be set aside. Ambler, 272.]

[So, if a power in a marriage settlement be created to the husband, to appoint the settled estate among the children, in such manner as he shall think proper, not exceeding estates tail; and he appoint to two of the children, one acre for their lives and the life of the survivor, then to fall into the residue, which he appoints to his second son for life, with remainders over; this execution is elusory and bad. 1 Brown, 450.]

[A power under a settlement to appoint to the children of the marriage is strictly confined to those children. 2 Wils. 369.]

[And a father having a power to appoint portions to younger children to be raised at all events, cannot annex a condition to the appointment of any child's share, 1 Wils. 224. under a power of appointing a real estate to the use of such child and children, &c. "and in default of appointment, the estate to be settled, to the use of all and every the child and children," an exclusive appointment to one is good. 1 Term Rep. 432.]

[So, under a power of appointing real and personal estate "to and among such of the testator's relations as shall be living at the time of his death, in such parts, shares, and proportions, &c." an exclusive appointment to one is good. Id. 435. n.]

### [(D a.) Other matters relating to powers.]

[*Attestation.* — The attestation to an instrument under a power which requires that it shall be attested, must express that all the forms requisite to give the instrument validity were observed; thus, if a signature as well as a sealing and delivery are required, an attestation that the deed was sealed and delivered, without having signed, will not be sufficient. 2 M. & S. 576. 4 Taunt 213.]

[If it is required by the terms of a power authorizing a party to charge by writing, that the execution of the writing shall be attested, the attestation must express that the formalities required in the execution of the writing have been observed. Therefore, where a writing was to be signed, sealed, and attested, and the attestation only expressed "sealed and delivered in our presence," it was held that the power was not well executed. 3 M. & S. 512.]

[A power of appointment to A. and B. "by any deed or writing under both their hands and seals, to be by them duly executed in the presence

presence of, and to be attested by two or more credible witnesses," means executed with all the form essential to the validity of the instrument, signed as well as sealed in their presence. 2 M. & S. 567. 4 Taunt. 213.]

[Where lands are limited to such uses as A. by any deed or writing under his hand or seal, attested by two or more credible witnesses, shall direct, a will with a memorandum of attestation, that it was signed (only) in the presence of the subscribing witnesses is not a good execution of the power. And the defect is not cured by calling one of the subscribing witnesses to prove that in fact the will was sealed, as well as signed, in their presence. 2 Mars. 102. 6 Taunt. 402.]

[An instrument under a power, is executed by two, with all formalities essential to give it validity, in the presence of witnesses; the attestation, however is defective. After the death of one of the parties, the witnesses subjoin a fresh and complete attestation. Held, that since it was done after the decease of one party, it was unavailing, for it was giving to his act a force and operation after his death, which did not belong to it in his lifetime. 2 M. & S. 576. 4 Taunt. 213.]

[Under a power to appoint copyhold premises, by deed or will, signed in the presence of three witnesses, the will only need be so signed. 7 T. R. 103.]

[Power to appoint by will, signed and published in presence of and attested by two witnesses; will "signed by me S. M.; witness A. and B," whom the testatrix informed that the paper was her will, held an insufficient execution. 7 Taunt. 355.]

[*Delegation of.* — A power cannot be delegated. Where, however, authority is given by A. to B. to execute a power himself or give it to another, by giving it to the other he does not delegate it. 4 T. R. 744.]

[*Seable,* under a power of attorney by A. to B. to underwrite any policy of insurance not exceeding 100*l.* and to subscribe the same in his (A.'s) name, and to settle and adjust losses, &c. "although B. cannot delegate his whole authority to another, yet, having signed a slip or a policy of insurance, the signature of his clerk for him, and in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being only a ministerial act which he might authorize another to do for him; but he must himself execute the power, in all matters in which his judgment and discretion are requisite. 1 Smith, 406.]

[*Illusory appointment.* — No appointment is held illusory in a court of law. 1 Taunt. 289.]

[*Void in whole or in part.* — In the case of realty, the execution of a power may be good as to part and void as to the residue. 4 T. R. 743.]

[A lease under a power at an entire rent, if void as to parcel of the land is void as to the whole. 2 East, 376.]

[If X. and Y. closes are devised for life, with remainders over, with power to the tenant for life to lease X. only reserving the ancient and accustomed rent usually paid on leasing it, a demise of both, reserving the ancient rent payable for X., is void against the remainderman altogether, and not as to Y. close only; the rent reserved issues out of both closes, so that the ancient rent was not reserved on demise X. If, however, there be separate reservations, viz. the ancient

rent for X., and an additional rent for Y., the lease is only void as to Y., since a lease may (nothing opposing) be good as to part, and void as to the residue. 8 M. & S. 99.]

[A lease for a term exceeding what the power warrants, is void in toto. 10 East, 158.]

[*Confirmation of appointment.* — An appointment, not valid in its original, cannot be made so by subsequent circumstances. 1 East, 442.]

[A lease by tenant for life, under a power not pursuant to the power, is void against the remainder-man, and incapable of confirmation by him. If, however, he accepts rent *eo nomine*, for a period subsequent to the death of tenant for life, though under an ignorance of his real rights, a yearly tenancy is thereby created. 7 T. R. 83.]

[*Revocation of appointment.* — The rule that an authority, once executed, is at an end, only applies where the execution was valid. 11 East, 194.]

[A power to appoint a sum of money by deed or will, is ambulatory during the life of the party appointing. 14 East, 423.]

[A power of appointment is given by a marriage-settlement unto and among all or any the child or children of the marriage, for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct. The survivor may revoke an appointment made by both, with power of revocation to them and the survivor, and appoint anew. 1 East, 442.]

[*Power to feme covert.* — A power given to a feme-covert, to be executed by will, is well executed by her writing, purporting to be a will. 4 Taunt. 294.]

[*Enrolment of.* — Where in a marriage-settlement by tenant in tail, a power is reserved to him of revoking the old and declaring new uses, by writing, attested by three witnesses and to be enrolled, with consent of certain trustees; the enrolment must be in his lifetime. 3 East, 410.]

[*How a power shall enure.* — Where A. was seized in fee, and conveyed to B. and his heirs, to the use of such persons and for such estates as he (A.) should appoint, by deed or will, remainder to the use of A. and his heirs, and afterwards granted a rent charge, with a covenant for him and his assigns to pay the same, and then A. and B. by lease and release, &c. release, and also appoint to C. the premises subject to the rent charge, and C. enters into a covenant with A. to pay the same rent charge. Held that C. is not liable personally to an action of covenant at the suit of the grantee of the rent charge as assignee, the conveyance operating under the power and not out of the estate of A. 2 Smith, 376. 6 East, 289.]

[*Miscellaneous.* — Though a tenant for life, with power to grant leases in possession for twenty-one years, convey his life estate to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished; he may still grant leases agreeable to the terms of the power. Dougl. 293.]

[A. having a life estate with a power to grant building leases for 99 years, so as the best rent be reserved that can be got for the same, &c. demises reciting the power; and by virtue thereof, and of all other powers in her vested to be in consideration of rent and of the surrender of a former demise by the previous tenant in fee, &c., and at the time the original lease and counterpart are mutually cancelled  
and

and exchanged; and on a special verdict finding the second lease to be void, the best rent not being reserved; held, that although A. had a life estate, and might have made a good demise for her life, yet the lease referring to the power, it was the intention of the parties it should operate by virtue of the power, and not out of the estate, and as the second lease was void under the power, and did not operate according to the intention of the parties, it was no surrender of the first. 2 Smith, 166. 6 East, 86.]

[*Statutable powers.* — Where, by statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and appear to have been so on the face of their proceedings. Cowp. 26.]

**(D b.) How it shall be destroyed.**

If tenant for life, who has a power to make leases, jointure, &c. levies a fine, suffers a recovery, or makes a feoffment, by which his estate is forfeited, his power shall be extinct. R. 1 Vent. 226, &c. 3 Salk. 276. Vide Uses, (L 1, &c. 6.)

So, if tenant in tail, who has power to make a jointure, &c. suffers a recovery, his power shall be extinct. R. 2 Lev. 60.

So, if he releases his power to the tenant of the freehold. R. 1 Co. 113. a. 174. a. Vide Uses, (L 6.)

So, a power in gross, not annexed to an estate fully, may be destroyed by fine, feoffment, &c. as if a tenant for life has power to make a lease to commence after his death. Hard. 415.

So, by a release with apt words. Hard. 416.

[So, a power shall not be executed, after the party for whose benefit it was created is dead. Thus where a power was given by marriage settlement to the husband to raise 10,000*l.* for a single younger child when he should think proper; the child, a female, being 14 years old, he called on the trustees to raise the portion immediately, and afterwards, the child being dead, filed his bill to have it raised as her administrator; the bill was dismissed. 1 Brown, 395.]

[Or an appointment under a power may be revoked if made revocable by the deed of appointment, or without being revocable, if the first appointment was by will, which is in its nature revocable. 1 Brown. 588.]

**(E) When it shall not be destroyed.**

But if a power be given to a lessee for years, and his assigns, to make leases for lives, such power goes to his executor, though only an assignee in law. R. 2 Jon. 110. Vide ante, (A 1.)

Or to the assignee of the executor. (R. 2 Jon. 110.)

But a power to an executor to make leases, does not extend to the executor of his executor. 2 Jon. 110.

So, if tenant for life with power to make leases, jointure, &c. makes a conveyance, which does not operate by transmutation of the possession, but only by limitation of the use, the power shall not be destroyed; as, if he covenant to stand seised to the use of another in fee. Dub. Hard. 413.

Or make a bargain and sale to another in fee by indenture inrolled Scamb. Hard. 413. And if it be a power in gross. R. Hard. 417.

Though the tenant for life had also the remainder in fee, which passed by the bargain and sale; for till the remainder comes *in esse* in possession, the estate by the power is not touched. R. Hard. 416.

[Though a tenant for life with power to grant leases in possession for 21 years, convey his life-estate to pay an annuity for his life, and the surplus to himself, he may still grant leases agreeably to the terms of the power. Doug. 292.]

[A leasing power is given to A., tenant for life, and after his decease to B.; A. grants to B. his life estate (without noticing the power) B. cannot lease under the power during A.'s life-time. 13 East, 118.]

So, a power in gross which does not take effect till the estate of him, who had the power, determines, shall not be destroyed by alteration of the estate; as, if tenant for life, with such power, grant *totum statum*. Per Hale, Hard. 416.

So, if A. settles land to the use of himself for life, with power to make leases, and afterwards to B. upon such trust as he shall afterwards declare; if A. declares the trust for payment of debts, and afterwards leases at a small rent, the lease is not defeated by the execution of his power; for it is precedent to it. R. Skin. 427.

So, an act by a stranger does not destroy a power; as if bargainee of tenant for life with power, &c. enfeoffs him in fee, the power is not thereby destroyed. Semb. Hard. 413. 417.

So, if tenant for life, with a power in gross, be disseised, the power is not destroyed; for the right of the tenant for life supports the power, and if he makes a lease pursuant to the power, and afterwards re-enters, it will be good. R. Hard. 417.

If a man having a power annexed to his estate, charges his estate, and afterwards executes his power, the estate which arises by the execution of the power shall be subject to the charge during the estate; as, if tenant for life, with power to make leases, grants a rent-charge, and afterwards makes a lease, the lessee shall take, subject to the rent-charge during the life of the lessor. Per Hale, Hard. 415.

[An estate being conveyed, by marriage-settlement, to trustees, to the use of the husband for life, with remainders over, and with a power to the husband with the consent of the trustees to revoke all the uses in the settlement, and the husband having granted an estate for his own life for valuable consideration, in the settled estate, a revocation subsequent thereto of all the uses, executed by him with the consent of the trustees, and a conveyance of the estate to a purchaser for valuable consideration also, but with notice of the prior grant for the husband's life, shall not affect the interest granted for his life. Doug. 477. 486.]

### (F) How the pleading shall be.

If a man pleads an act done, pursuant to a power, he ought to show the power to be strictly pursued in all circumstances.

If he says, that it was executed in the presence of three credible witnesses, he ought to show who were the witnesses by name. D. 1 Co. 111. a.

### [(G) When it cannot be executed.]

[If there be a power under a marriage-settlement to give to the children of the marriage in such shares, &c. and for such estate, &c.  
and

## POPERY.

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and there be but one child of the marriage, such child must have the whole estate settled. 2 Wils. 336. 2 Brown. 588.]

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## POLICY OF ASSURANCE.

Vide MERCHANT, (E 9, 10.)

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## POLLS.

Vide CHALLENGE, (C 1, 2.)

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## POLYGAMY.

Vide JUSTICES, (S 5.)

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## PONE.

Vide PLEADER, (3 K. 6.)

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## PONTAGE.

Vide TOLL.

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## POOR.

Vide FORMA PAUPERIS — JUSTICES OF PEACE, (B 64, &c.) — USES,  
(N 1. 7. 10.)

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## POPE.

Vide ECCLESIASTICAL PERSONS, (B 1.) — JUSTICES, (K 9.) — POPERY.

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## POPERY.

(A) The authority of the Pope ; how usurped.

- (A 1.) In giving the pall. p. 24.
- (A 2.) In sending his legates. p. 24.
- (A 3.) In receiving appeals. p. 24.
- (A 4.) In exempting of clerks. p. 24.
- (A 5.) In exacting tenths and first-fruits. p. 25.

(B 1.) How the usurpation of the Pope has been restrained. p. 25.

- (B 2.) In appeals to Rome. p. 25.
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- (B 5.) By the dissolution of monasteries, and by oaths. p. 27.
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- (B 8. a.) Or to present to a benefice. p. 30.
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### (A) The authority of the Pope; how usurped.

#### (A 1.) In giving the pall.

What authority the pope had in this kingdom, vide Ecclesiastical Persons, (B 1.)

Before the time of William the Conqueror, the pope had not any jurisdiction allowed within the realm among the Britons or Saxons. Dav. 87, 88.

But in the time of William the Conqueror, the pope usurped upon the bishops, to take their palls from him. Dav. 89.

And if an archbishop or bishop did not do it, he was deposed. Ibid.

#### (A 2.) In sending his legates.

So, in the time of William the Conqueror, the pope sent his legates to England. Dav. 89.

But in the time of H. 1. it was allowed that the archbishop of Canterbury should be *legatus natus*. Dav. 90.

And that no other legate should be sent by the pope, without the king's request. Dav. 90. b.

#### (A 3.) In receiving appeals.

So, in the time of Will. 2. and before, no appeal to Rome was admitted. Dav. 89. b. Vide post, (B 2.)

But, in the time of Stephen, appeals to Rome were usurped. Dav. 90.

And by canon in the synod of London, before H. bishop of Winchester, the pope's legate, it was decreed, that an appeal should lie from a provincial council to the pope. Dav. 90. b.

#### (A 4.) In exempting of clerks.

So, in the time of H. 2, the pope usurped the exemption of clerks from the secular power. Dav. 91.

And a clerk indicted for murder prayed his clergy, and was sent to the bishop of Sarum, his ordinary, to make his purgation; which if he did not, he ought to have been remanded to the temporal court; but he  
sent

*How the usurpation of the pope has been restrained.* 25

sent him to Thomas Becket, the archbishop, and by him he was thrust into an abbey to shelter him from justice. Dav. 91.

(A 5.) In exacting tenths and first-fruits.

So, by the pope Boniface the 9th, or John 22d, payment of tenths and first-fruits was imposed upon all archbishops and bishops. Vide Tenths, (A—B).

(B 1.) How the usurpation of the Pope has been restrained.

How provision to benefices by the pope was restrained, vide Provisor, (A 2.)

How the ecclesiastical jurisdiction and supremacy of the king has been maintained, vide Prærogative, (D 9, &c. 17.)

The kings of England have always disallowed the encroachments and usurpations of the pope, and the court of Rome.

And therefore the pope was not allowed to annul the temporal law by his bull. 11 H. 4. 37.

*A fortiori*, not the statute law. 2 Cro. 517.

All dispensations by him, contrary to law, were void. Ibid.

So, the dissolution of a perpetual vicarage, after the st. 4 H. 4. 12. R. 2 Cro. 517.

The dissolution of a spiritual corporation; for, *quoad* the corporation, it is temporal. Vide 2 Cro. 517.

(B 2.) In appeals to Rome.

So, William Rufus rejected and refused all appeals to Rome. Dav. 89. b. 4 Inst. 341. Vide ante, (A 3.)

And though king Stephen allowed them, yet, by the constitution of Clarendon, in the time of H. 2. it was ordained, that all appeals should be from the archdeacon to the ordinary, from him to the metropolitan, from him to the king. Dav. 91. 4 Inst. 340.

And by a canon, that no decree of the pope should be executed within the realm, upon pain of imprisonment and confiscation of goods. Vide Dav. 91.

And now, by the st. 24 H. 8. 12. if any purchase or procure, in any cause testamentary, matrimonial, of divorce, or tithes, from the see of Rome, or other foreign court, any foreign process, appeal, sentence, &c. or execute the same, he shall incur a *præmunire*. — So by the st. 25 H. 8. 19.

And if any prelate, pastor, &c. by occasion of any appeal, &c. refuse to administer sacraments, divine service, &c. he shall have a year's imprisonment, and make fine and ransom at the king's will.

And this act being repealed by the st. 1 & 2 Ph. & M. 8. was afterwards revived by the st. 1 El. 1.

(B 3.) By abolishing the power of the pope.

By the st. 25 H. 8. 20. no archbishop, or bishop, shall pay annates, pension, or other sum of money to the see of Rome, on pain of losing all his goods, and the possessions of his bishopric.

Nor

Nor shall send there, or procure any bulls, breves, palls, &c. but the same shall cease: by the st. 28 H. 8. 16. shall be void.

So, by the st. 25 H. 8. 21. no person in the king's dominions shall pay any pension, cense, Peter-pence, or other imposition to the use of the pope, or see of Rome.

And no visitation of any monasteries, colleges, &c. shall be made by authority of the see of Rome. By the same st. s. 20.

And though all statutes for abolishing the authority of the pope were repealed by the st. 1 & 2 Ph. & M. 8. those statutes were afterwards revived by the st. 1 El. 1. 4 Inst. 325.

And by the st. 1 El. 1. no foreign prince, person, prelate, &c. shall use any power, jurisdiction, authority, &c. within any of her majesty's dominions, but the same shall be abolished for ever.

All jurisdiction and authority of the pope is now utterly abolished. So, all jurisdiction derived from him.

And therefore, the concurrent jurisdiction of the archbishop of Canterbury, within an inferior diocese, is now taken away; for he had it not as archbishop, but as *legatus natus*, and therefore it was derived from the pope.

But the st. 28 H. 8. 16. which prohibits the using of a bull of the pope, &c. does not extend to alleging it as an inducement to the demand of a pension in pleading. R. 2 Lev. 251.

(B 4.) By a penalty upon the maintainers of his authority.

So, by the st. 1 El. 1. if any in the queen's dominions, by writing, printing, teaching, &c. by express word or act, advisedly and directly maintain, &c. the authority, &c. spiritual or ecclesiastical, of any foreign prince, prelate, &c. heretofore usurped, &c. for the first offence he shall forfeit all his goods real and personal; and if they are not worth 20*l.* shall besides suffer a year's imprisonment without bail. And all the benefices or ecclesiastical promotions of any spiritual person so offending, and thereof convict and attain, shall thereby be void; for the second offence, he shall incur a *præmunire*; for the third, shall be guilty of high treason. Vide *Præmunire*, (B).

And by the st. 5 El. 1. for every such offence, being indicted for it within a year, he shall incur a *præmunire*.

If a subject imports books written out of the realm in support of the supremacy of the pope, knowing the effect of them, and sells or utters them secretly to persons conusant of the contents, he shall be within this statute. R. by all the J. of B. R. and C. B. and the Ch. Baron, (except three). Dy. 282. a.

So, if any one receives and reads such book, and afterwards, by speaking in conversation, allows it. R. Dy. 262. a.

But by the st. 1 El. 1. none shall be impeached for an offence by preaching, teaching, or words, unless within half a year; and if imprisoned for such cause, and not indicted in half a year after the offence, shall be set at liberty.

So, the receiving and reading a book, written in support of the supremacy of the pope, without more, is not within the st. 5 El. 1. R. Dy. 282. a.

Vide Justices, (K 9. — X 1.)

(B 5.) By

(B 5.) By the dissolution of monasteries, and by oaths.

How the power of the pope was restrained by the dissolution of monasteries, &c. vide Hospital — Monastery.

How by the oaths of allegiance and supremacy, vide Allegiance, (B 2 &c.) — Justices of Peace, (B 17, 24.) — Officer, (K 7.)

(B 6.) By the restraint of reconciliation to the pope, and of the erection of seminaries,

As to restraining the reconciliation, vide Justices, (K 9.)

By the st. 1 Jac. 4. any under the king's obedience, who shall go, or shall send any child, or other person under his government, beyond the seas, out of the king's obedience, to enter into, or be resident in any college, seminary, &c. or repair to the same to be instructed, &c. in the popish religion, shall forfeit 100*l.* to his majesty.

And the person, so going or sent in respect of him or herself only, shall be disabled to inherit, purchase, take, or enjoy any lands, &c. goods, debts, legacies in any of his majesty's dominions. Vide post, (B 7.)

So, by the st. 3 Car. 1. 2. any who shall go or send, &c. to any college, seminary, &c. or any private popish family, where he shall be by any popish person instructed, &c. or shall cause to be sent any money, &c. for the maintenance of any child gone or sent, or by way of alms, &c. for any abbey, nunnery, school, &c. shall be disabled to sue in law or equity, to be committee of a ward, executor, or administrator, capable of a legacy, or deed of gift, to bear any office, shall forfeit all his goods and chattels, and all his lands of freehold during life.

So, by the st. 3 Jac. 5. if the children of any subject, (not soldiers, mariners, merchants, their apprentices or factors,) to prevent good education in England or other cause, shall be sent, or go beyond sea, without licence of the king, or six of the privy council, (whereof the principal secretary to be one,) under their hands and seals, such child, &c. shall take no benefit by any gift, conveyance, descent, devise, &c. of any lands, leases, goods, &c. Vide post, (B 7.)

And a person sending, &c. without such licence, shall forfeit 100*l.*, one-third to the king, one-third to him who sues, &c. one-third to the poor.

So, a person already gone without licence, &c. who shall not take the oath in six months after return, shall take no benefit by any gift, &c. By the same statute.

So, by the st. 27 El. 2. all jesuits, seminary, or other priests ordained by authority from the see of Rome, shall depart the realm; and if any born in the queen's dominions come into, or remain there, such offence shall be high treason.

And if any receive, relieve, &c. any such, knowing him to be so, it shall be felony.

And any who directly, or indirectly, sends relief to such, or to any seminary, or to any there, incurs a *præmunire*.

And every subject, knowing such jesuit, priest, &c. to be in the queen's dominion, and not discovering it to a justice of peace in twelve days, shall make fine, and be imprisoned at the queen's pleasure: and a justice

justice of peace not informing, &c. some of the privy council, &c. in 28 days, forfeits 200 marks.

But this act extends not to a jesuit, &c. who in three days after his arrival submits to an archbishop, bishop, or justice of peace, &c. By the same statute.

So, by the st. 35 El. 2. a jesuit, &c. suspected, being examined by any having authority, and refusing to answer directly, whether jesuit or not, shall be committed without bail, till he make direct answer.

The indictment for treason ought to say, that he was born within the king's dominions.

That he was ordained by the authority of the see of Rome.

But it need not say, at what place born, or ordained.

A secretary of state, or the court of B. R. may examine any, whether he be a jesuit, &c. 1 Sal. 351. Dub. Skin. 369.

And ought to make a conviction, if he refuses. 1 Sal. 351.

But a commitment generally, till delivered by law, will be ill. R. 1 Sal. 351. Skin. 369.

#### (B 7.) By disability ; to take lands or tenements.

By the st. 1 Jac. 4. a person going, or sent into a college, seminary, &c. (vide ante, B 6.) shall be disabled in respect of him or herself only, and not of his heirs, or posterity, to inherit, purchase, take or enjoy any lands, tenements, goods, debts, legacies, &c.

And by the st. 3 Jac. 5. a child going, or sent without licence, &c. (vide ante, B 6.) shall take no benefit by any gift, conveyance, descent, devise, &c. of any lands, &c. leases, goods, till he, being of eighteen years of age, take the oath, § Jac. 4. before a justice of peace. And in the mean time the next of kin, who shall be no recusant, shall have the said lands, &c. goods, &c. But upon conformity, by taking the oaths and sacraments, shall account for the profits, &c. and restore the goods, &c. to him or her so conforming.

By the st. 3 Car. 1. 2. any who shall go or send, &c. (vide ante, B. 6.) being convict on information, shall be disabled to sue, be committee of a ward, executor, or administrator ; shall not be capable of any legacy, or deed of gift, or office ; and shall forfeit all his goods and chattels, all his lands, tenements, rents, annuities, offices, and estates of freehold, for his life. Provided, none who conforms to the church of England, and receives the sacrament within six months after return, shall incur the penalties ; but shall have his lands restored during his conformity.

But by the st. 1 Jac. 4. a person sent to a seminary takes the lands and the estate vested in him : for the protestant heir has only the pearnancy of the profits. Per two J. Hob. 73. Eq. Ca. 34. (2d Part of 2 Mod. Ca.)

And such person may make a bargain and sale ; and thereby take the lands out of the heir. Hob. 74.

So, by the st. 11 & 12 W. 3. 4. a person educated in the popish religion, or professing the same, who shall not, in six months after the age of eighteen, take the oaths, and subscribe the declaration by the st. 30 Car. 2. &c. shall, in respect of himself only, and not of his heirs or posterity, be disabled to inherit, or take by descent, devise, or limitation, in possession, reversion or remainder, any lands, &c. And during

*How the usurpation of the pope has been restrained.* 29

during his life, till he take the oaths, and subscribe, &c. his next of kin, who is a protestant, shall enjoy the lands, &c. without account for the profits; but for wilful waste, shall answer treble damages, &c.

And from 10th April 1700, every papist, or person professing so to be, shall be incapable to purchase in his own name, or to his use, or in trust for him, any lands, &c. and all estates, terms, interests, or profits out of lands, made, suffered, or done to his use, or on trust mediately or immediately for his benefit, or relief, shall be void.

And this clause was confirmed by the st. 3 Geo. 18.

[Conviction is not necessary to prevent a papist's devising lands in Ireland; but parol evidence shall be sufficient to prove he died a papist, though he had formerly renounced and conformed. Andr. 222. 235. Str. 1095.]

If a papist was above eighteen years at the time of the act, yet he shall be disabled to inherit: for the statute did not intend more indulgence to persons of full age, than to infants. Semb. Eq. Ca. 35. (2d part of Mod. Ca.)

[A papist above eighteen years and six months at making stat. 11 & 12 W. 3. c. 4. cannot take freehold or leasehold estate by will. 3 P. Will. 40.]

[But he may take lands by descent, or a share of personal estate, by the statute of distributions. Ibid. Per King, C.]

If an estate, term, &c. appears to be in trust for a papist; upon a bill exhibited by the next protestant kin, he shall have an account of the profits from the time of filing his bill. R. Eq. Ca. 146. (2d part of 2 Mod. Ca.)

[If popish heir make a mortgage, the next protestant kin may redeem, and receive rents and profits till conformity of the heir. Bunb. 346. 2 Eq. Abr. 379. pl. 12. Com. 661. S. C.]

[A papist who has not taken the oaths, &c. (under an incapacity to hold under the statute of William,) may devise lands to a protestant. Willes, 75. Com. 570. 2 Eq. Abr. 626. pl. 26. S. C.]

[He may sell to a protestant by stat. 3 Geo. 1. c. 18. s. 4. Ibid.]

[He may devise lands for payment of his debts to protestants. Ibid.]

[Also for payment of debts to papists. Sembl. ibid.]

[And he may by a bond charge lands, &c. Sembl. ibid.]

If a man devises lands to be sold for payment of debts and legacies, the residue to A. who is a papist; the devise of the residue of the money shall be considered as land, and shall be void; otherwise, by payment of the debts A. would have the land, and the statute would be eluded. R. Eq. Ca. 156. 170. (2d part of 2 Mod. Ca.)

[If a devise be of a term to a papist, the protestant next of kin shall have a decree for the term to be assigned to him, with an account of the profits from the time of his purchase. Eq. Ca. 146. Ibid.]

[If a lease for lives is made to a papist, and he commits high-treason, he forfeits nothing, for the lease was void. R. per curiam, dissent. Foster J. who thought he might take for the benefit of the crown: as if a villein purchase, he may take for the benefit of his lord. 1 Wils. 176.]

[But if a papist, tenant in tail, conveys his estate to a protestant, to make

make him tenant of the freehold, till a common recovery is suffered, which is suffered accordingly, and the recovery declared to be to the use of the papist in fee, who afterwards on his marriage by lease and release conveys the same to the use of himself for life, then to his wife for life, remainder to his first and other sons in tail-male, with remainders over, and limitations to trustees to preserve contingent remainders; the recovery is good, notwithstanding 11 & 12 W. 3. the settlement good, and his eldest son shall succeed to the remainder in tail, though the father was attainted of high-treason. By the delegates, four against one. Str. 267.]

And by the st. 3 Geo. 18. no sale for a valuable consideration of any manors, lands, &c. by the reputed owner in possession, to a protestant merely for the benefit of a protestant, shall be impeached in respect of the disabilities by the st. 1 Jac. 4. or 11 & 12 W. 3. 4. unless the person entitled to take advantage of such disability, before such sale recovered the said manors, lands, &c. or gave notice of his claim, to the purchaser, or entered his claim at the general sessions of the county, &c. where the lands, &c. lie, before the contract for such sale, and *bonâ fide* pursued his remedy for them. Vide post, (B 12.)

[And by st. 18 G. 3. c. 60. so much of 11 & 12 W. 3. c. 4. "as relates to the apprehending or prosecuting of popish bishops, priests, or jesuits, or that subjects them, or papists keeping school, or educating or boarding youth in the realm, to perpetual imprisonment, or that disables papists to inherit or take by devise or limitation, any estate, &c. and gives the same to the next of kin, being a protestant, and so much of the same act as disables papists to purchase, &c. and makes void all estates, &c." is repealed.]

[And the 1 Geo. 1. st. 2. c. 55., and 3 Geo. 1. c. 18. which required the names and real estates of papists to be registered, and their deeds and wills to be enrolled, have been repealed by 31 G. 3. c. 32. s. 21.]

[See 11 Geo. 2. c. 17., as to what conformity removes disabilities.]

#### (B 8. a.) Or to present to a benefice.

By the st. 3 Jac. 4. s. 8. the king, &c. may refuse 20*l.* per month, and seise two parts in three of all the lands, tenements, and hereditaments, of a person not coming to church, &c.; by virtue of which seisure, if the king seises two parts of a manor to which an advowson is appendant, the king shall have two turns of the advowson, and shall present to it alone.

So, if an advowson be in *gross*, the king may seise it, as two parts of lands, tenements, and hereditaments: for an advowson is an hereditament.

By the st. 3 Jac. 5. every popish recusant convict, while a recusant, and by the st. 1 W. & M. 26. every one recorded for refusing to sign the declaration 1 W. & M. 15. or for refusing the oaths, or seised or possessed in trust for him, and by the st. 12 Ann. 2 sess. 14. every papist, or person professing the popish religion, or child of such, under age, or any mortgagee, trustee, or person any ways intrusted for such, directly or indirectly, mediately or immediately, though declared

declared in writing or not, shall be disabled to present or nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or to grant any avoidance of them: but the presentation in twenty-six counties shall belong to the chancellor and scholars of Oxford, and in twenty-seven counties to the chancellor and scholars of Cambridge university.

Provided, their presentation to a benefice with cure, to any who hath a benefice, &c. with cure, or shall be non-resident sixty days, shall be void. By the st. 3 Jac. 5. and 1 W. & M. 26.

And by the st. 1 W. & M. 26. s. 4. if a trustee presents, &c. without giving notice of the avoidance to the vice-chancellor in three months after in writing, he forfeits 500*l.* to the chancellor and scholars.

By the st. 12 Ann. 14. the ordinary may tender the declaration 25 Car. 2. 2. to any person presenting, or, if absent, summon him, and tender it, and is required to examine on oath the person presented if his patron be not, to his knowledge or belief, a papist, or any ways trusted, &c. for such; and if the presenter refuse the declaration, or to appear, or the presented refuse to answer directly what he knows, hath heard, or believes touching the same, the presentation shall be void.

And the university may exhibit a bill to discover a secret trust, &c. or if a *quare impedit* be depending, at the request of the chancellor and scholars, being plaintiffs or defendants, the court may examine on oath, or by affidavit, or commission, the patron, and clerk, &c. and may enforce the producing of deeds relating to such secret trust. By the same stat. s. 4.

And the university may sue a *quare impedit* by the name of chancellor and scholars, or by their corporate name, at their election. By the same stat. s. 9.

[The court may direct commission under this statute to the prothonotaries, or commissioners' names to be struck by them, and interrogatories to be settled by them; or may refuse to grant commission, if defendant will not agree to plead the popery acts only. Barnes, 2. 2. 350.]

[By the st. 11 Geo. 2. 17. after 6th May 1738, every grant, or devise, by a papist, or trustee, of any advowson, school, hospital, or donative, or of any avoidance, shall be void, unless made *bonâ fide* for a full and valuable consideration to a protestant, for his own benefit only.

And a mortgagee, grantee, or devisee, &c. may be examined as by the st. 12 Ann. 14. though no trust in writing. By the same statute.

### [(B 8. b.) To hold an office.]

[By 31 Geo. 3. c. 32. catholics in England may hold inferior civil or private offices.]

### (B 9.) To what cases the disability does not extend.

But a limitation to A. who is a papist, for life, remainder to his first and other sons in tail, remainder to B. who is a protestant; the remainder shall be good.

And

And A. takes an estate, which supports the remainder: for the estate limited to him is not void entirely, though the next of kin, being a protestant, may take the profits. R. Eq. Ca. 34. (2d part of 2 Mod. Ca.)

So, an heir, though a papist, shall take by descent; but the next protestant of kin may take the profits. Eq. Ca. 34. Ibid.

So, he shall sue in equity to defeat a fraudulent conveyance by his ancestor. Eq. Ca. 34. Ibid.

So, though by the stat. 11 & 12 W. 3. 4. in the second clause, no papist shall purchase, &c. but all such estates shall be void; and therefore, a devise to him, being a purchase, is void; yet if a devise be to A. under eighteen, educated as a papist, who in six months after eighteen conforms, &c. A. shall take, and the inheritance vests in him in the meantime. R. Eq. Ca. 156. 180. Ibid.

So, if an estate by devise be disposed to an heir at law in a particular manner, it is not a purchase by him, and void; for it comes to him in lieu of an estate which otherwise would have descended. Eq. Ca. 170. Ibid.

So, if a papist tenant in tail suffers a recovery, and declares the use to himself and his heirs, it is not a purchase within the st. 11 & 12 W. 3. 4. but a new modification of his former estate. R. Eq. Ca. 173. (2d part of 2 Mod. Ca.)

[A recovery suffered by a papist, instructed in a seminary or college of jesuits beyond sea in the popish religion, was holden good. 10 Mod. 118. 356. 406. 11 Mod. 355. 1 Str. 318. 2 Brown's P. C. 203. S. C.]

So, a papist may be tenant by the curtesy, or in dower; for such tenant is not a purchaser. Eq. Ca. 173. (2d part of 2 Mod. Ca.)

So, if a papist levies a fine to bar the right of another, he is not thereby a purchaser. Eq. Ca. 175. Ibid.

Or settles his estate with a power of revocation, and afterwards revokes. Eq. Ca. 175. Ibid.

So, by the st. 11 Geo. 2. 17. papists conforming, taking the oaths, &c. and subscribing the declaration, 30 Car. 2. and protestants claiming under them, shall be freed from the same disabilities, unless the next of kin shall have recovered by judgment or decree six months before, or unless he return to the popish religion.

[If there is a devise of lands to trustees to the use of the second son of A., (which second son is a papist,) remainder to the third, &c. sons of A., one of whom is not a papist, remainder to the sisters of testator, and if A. is still living, the sisters are not entitled to the legal estate, nor can maintain ejectment. B. R. H. 91.]

### (B 10.) By registering the estate.

So, by the st. 1 Geo. 55. a papist, not taking the oaths and subscribing the declaration 30 Car. 2. in six months after full age, and having an estate in lands, &c. shall register such estate and interest, &c. in six months after the time for taking the oaths, and his name, and at what rent let, or fine paid, and in what place they lie, and in whose possession, &c. in a book kept by the clerk of the peace, in the county where the lands lie; or in default, &c. shall forfeit the fee of such

such lands, &c. not registered, if he or any in trust have the fee; otherwise, the value of the inheritance.

And the owner's name shall be subscribed to such register, in the presence of two justices of the peace.

And persons beyond sea shall have twelve months longer time.

By the st. 3 Geo. 18. the time of registering is enlarged till the 20th of October 1717, and by the st. 3. 6. 9. and 11 Geo. 2. 11. till the 29th of September 1738. By the st. 12 Geo. 2. 18. enlarged till the 28th of November 1739.

And if a manor lie in two counties, the register shall be in the county where the manor-house is.

(B 11.) By sale, &c. not inrolled.

By the stat. 3 Geo. 18. no manors, lands, &c. or interest therein, or rent, &c. out of them, shall pass from papists, &c. by deed, unless inrolled in the king's court of record at Westminster, or in the county where the lands lie, &c. in six months after the date; or by will, unless inrolled in six months after the death of the testator.

But by the st. 10 Geo. 4. it is sufficient, if a deed or will made after the 29th of September 1717, be inrolled on or before the 29th of September 1724, or by the st. 3 Geo. 2. 29. before the 29th of September 1731, or by the st. 8. Geo. 2. 25. before the 29th of September 1735. [Further time is given for the inrolment of their deeds and wills, and for the relief of protestant purchasers, by st. 12 Geo. 3. c. 10. 14 Geo. 3. c. 37. 17 Geo. 3. c. 45. 18 Geo. 3. c. 46.]

(B 12.) When default of registering does not prejudice.

But by the st. 1 Geo. 55. a purchaser *bonâ fide* for a just and valuable consideration, before conviction, or ejectment brought for the forfeiture, and not knowing of the default in registering, shall not be prejudiced by it.

So, by the stat. 3 Geo. 18. no sale for a full and valuable consideration, by a papist the reputed owner, or in receipt of the rents, &c. of any lands, &c. or interest out of them, to a protestant, for the benefit of a protestant, shall be avoided on pretence of the disability of him, or any under whom he claims, unless the person taking advantage of such disability have recovered before sale, or given notice of his claim to the purchaser; or, before the contract for the sale, shall have entered his claim in open court at the quarter sessions of the peace for the county, and *bonâ fide* pursued his remedy. Vide ante, (B 7.)

So, by the st. 6 Geo. 2. 5. no such sale shall be avoided by reason the deed or will through which the title was derived, shall be avoided, so as no advantage hath been taken for want of inrolment. before the purchase made, and so as the purchaser had no notice before his purchase, that the maker of the deed or will was a papist, and no judgment or decree, hath been had for want of inrolment.

Vide Justices of Peace, (B 14.)

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PORT.

Vide NAVIGATION, (E).

**Cinque Ports.**

Vide ABATEMENT, (D 3. 5.) — FRANCHISES, (E 1, &c.)

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**PORTAGE.**

Vide LONDON, (K 2.)

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**PORTION.**

Vide CHANCERY, (2 M 10. — 3 Z 1, &c. — 4 W 24.)

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**PORTMOTE COURT.**

Vide COURTS, (I).

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**[PORTSMOUTH.]**

[The private act, 14 Geo. 2. c. 43., is not annulled by st. 32 Geo. 3. c. 103. 15 East, 372.]

[The powers and consequent rights conferred by the private st. 14 Geo. 2. c. 43. on the person therein named were not annexed to his character as lord of the manor. 15 East, 372.]

[The majority of mayor and aldermen for the time being is sufficient to constitute the corporate assembly of Portsmouth. Cowp. 530.]

[Precedent qualification for a burgess of Portsmouth to entitle him to be elected alderman. Cowp. 530.]

[An infant cannot be elected a burgess of Portsmouth, though not sworn in till of age. Cowp. 226.]

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**[PORTUGAL.]**

[Construction of the fifth article of treaty between Great Britain and Portugal. 5 Taunt. 101.]

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**POSSE COMITATUS.**

Vide VISCOUNT, (C 2.)

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**POSSESSION.**

Vide CHANCERY, (D 12.) — DISCENT, (C 9, 10.) — EXECUTION, (A 5.) — PLEADER, (C 39. — 3 M 9. 17. 39.) — PRÆROGATIVE, (D 63.) — TRESPASS, (B 2, 3, 4)

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**POSSIBILITY.**

Vide ASSIGNMENT, (C 3.) — GRANT, (D.)

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**POST-DISSEISIN.**

Vide ASSIZE, (F 1, &c.)

**POSTEA.**

## POSTEA.

Vide PLEADER, (T).

## [POST-HORSE ACT.]

[The post-horse act, 25 Geo. 3. c. 26., only requires the post-masters, &c., in making up their accounts, to insert therein the number of horses let and the number of miles, &c. It does not require the amount of the duties received to be specified. A declaration, therefore, on this statute by the farmer of the duties against a post-master, charging the defendant with having made false accounts, "in not inserting in the account the sums of money received by him," charges no offence, and is therefore bad after verdict. 3 T. R. 632. Id. 637.]

[By the st. 25 Geo. 3. c. 51., the commissioners of stamps are authorized to appoint under them collectors of post-horse duties. By st. 27 Geo. 3 c. 26., reciting the former act, these duties are to be let to farm: the farmer is to be appointed, under-seal-collector of the duties; and certain obligations thrown by st. 25 Geo. c. 51. on another class of persons, are by this act cast upon "the person farming the duties, and the appointed collector thereof." In an action for a breach of these obligations, the declaration averred that the defendant was a collector of the duties recited in st. 27 Geo. 3. c. 26., the judgment was arrested, since *non constat* that he was the farmer of the duties, or any more than a collector appointed under the first act, and therefore that the obligations in question were not thrown upon him; nor was the defect cured by verdict, since the declaration showed no title whatever. 6 T. R. 163.]

[By st. 44 Geo. 3 c. 198., where the distance is ascertained, though the hiring be for a day, the duty is payable by the mile; if not ascertained, by the day. 11 East, 530.]

[If a letting to hire be in its nature a hiring to travel post, within the st. 25 Geo. 3. c. 51., it makes no difference that the owner of the horse rides it himself. 3 T. R. 72.]

[The words "travelling post" used by the st. 25 Geo. 3. c. 51. must be received in the popular sense; therefore, a neighbour who lets a horse to go from one town to another and return, within the compass of a day's journey, is not liable to the penalty imposed by that act for not taking out a licence. 3 T. R. 69. 8 East, 584.]

[Letting a horse to hire to carry a private express, that is, one not sent by government on public service, is a hiring to travel post within the statute of 25 Geo. 3. c. 51. 3 T. R. 72.]

[The letting of a horse to hire to carry a government express, is not a letting to hire within the meaning of the post-horse act of 25 Geo. 3. c. 51. 3 T. R. 519.]

[Under schedule B. of st. 44 Geo. 3. c. 98., the duty is laid on every horse hired by the mile or stage, whether or not for travelling post. 8 East, 580. Id. 584. S. P. on statute 25 Geo. 3. c. 51.]

[A letting to hire a horse to go a certain stage and back again, within the day, requires a licence under schedule A. st. 44 Geo. c. 98. 15 East, 257.]

[The sense of the word "travelling," as used in the post-horse acts, must be limited to cases where a traveller is conveyed; therefore, the letting to hire a hearse for conveying a corpse from York to Brecon (for which a gross sum was paid, not so much per mile), is not chargeable with the post-horse duty. 3 M. & S. 15.]

[A coach, licensed under a local act to be used as a stage, is not protected by such licence from the post-horse duties, if hired wholly by an individual to perform a journey; and the proprietor is liable to account to the farmer of those duties for one-fourth of the hire, if let by him to carry out and bring back, notwithstanding such hiring may be to go to and return from some place within the distance and on the road to the place specified in his licence; and although he received no greater sum than his fare would have been, had he proceeded full on the usual journey as a stage. 1 Price, 317.]

[A carriage let to hire for less than twenty-eight days (not being let by the mile or stage) is not required to be numbered by st. 48 Geo. 3. c. 98. Wightw. 73.]

[It seems that under a deputation from the commissioners of stamps authorizing A. and B. (collectors of the post-horse duties) to grant licences for letting post-horses, a licence by B. for himself and A. is valid; since otherwise, if one of the collectors were to die, the power of granting licences would be at end. 3 M. & S. 15.]

[The offence, within the st. 25 Geo. 3. c. 47., in not delivering to the assessors a list of horses liable to the duty, is not complete until after demand made by the assessors. 6 T. R. 75.]

[A declaration in a penal action on the post-horse act, 27 Geo. 3. c. 26., by the farmer of the tax, which states that the offence was committed, with intent to defraud the farmer (not the king), is not therefore objectionable. 3 T. R. 632.]

[It seems that a declaration against a post-master on the st. 25 Geo. 3. c. 26., for delivering in a false account, not specifying in what particular it was so, is bad after verdict. 3 T. R. 632.]

[In a suit by the crown, on the post-horse act, the court cannot give costs to the defendant, although the farmer of the duties is the real party against him. 1 Anst. 40.]

[The costs paid to the prosecutor, on compounding a penal action, on the post-horse act, are not to be taken as a part of his share. 1 B. and P. 51.]

### [POST-OFFICE.]

[Action does not lie against the post-master-general for a bank note stolen by one of the sorters, out of a letter delivered into the post-office. Cowp. 754.]

[A post-master is bound to deliver all letters to the several inhabitants within a post-town or place, at their respective places of abode, at the rates of postage only, as established by act of parliament. Cowp. 182. 3 Wils. 443. 5 Burr. 2716. 2 Blk. 906. Lofft. 753.]

[A prisoner acquitted on a charge of felony, committed as a sorter and charger of letters, cannot be convicted on another count, charging him generally as a person employed in the post-office under 7 Geo. 3. 2 Blk. 789.]

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## FOUND.

Vide DISTRESS.

## Found-breach

Vide DISTRESS, (D 2.)

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## PRAIER.

Vide prier.

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## Common prayer.

Vide PARSON, (C) — SACRAMENTS.

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Vide ABATEMENT, (I 21.)

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## PRÆCIPE IN CAPITE.

Vide DROIT, (C 1.)

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## PRÆCIPE QUOD REDDAT.

Vide RECOVERY, (B 3, 4.)

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## PRÆMIUM PUDORIS.

Vide CHANCERY, (4 D 21.)

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## PRÆMUNIRE.

- (A) The penalty of praemunire. *infra*.
- (B) What offences are within the penalty. p. 38.
- (C) What process against the offender. p. 39.

### (A) The penalty of praemunire.

A *praemunire* (so called from the words of the writ *quod praemunire facias* A. &c.) imports an offence, by which a man incurs the penalty of the st. 16 R. 2. 5. viz. to be out of the king's protection, to be attached in his body, to lose his lands and tenements, goods and chattels. Co. L. 129. b.

And, therefore, by a judgment in *præmunire*, the defendant shall be out of the king's protection, and imprisoned during the king's pleasure. Co. L. 130. a.

So, he shall lose all his goods and chattels, and his lands and tenements in fee. Ibid.

So, his lands in tail, &c. for his life. Co. L. 130. a.

And being out of the king's protection, in an action by him, the tenant or defendant may show the whole record, and demand judgment, whether he shall be answered. Lit. s. 199.

So, by the common law, being as an enemy to the king, it was not murder, or any offence, if a man killed him. Co. Lit. 130. a.— But now by the st. 5 El. 1. it is unlawful to kill him.

### (B) What offences are within the penalty.

By the st. 35 Ed. 1. *de asport. relig.* 2, 3. no abbot, &c. shall cause to be carried out of the king's dominion any tax imposed on religious houses, under the name of rent, &c. or any goods of their houses, &c. nor shall any abbot, &c. being an alien, assess any tallage, payment, or other burden on houses in subjection to them, on pain of all that they have, or may forfeit. And this is confirmed by the st. 3 R. 2, 3. and contains in effect the penalty of a *præmunire*. 2 Inst. 587.

And it seems, that an offender against the st. 25 Ed. 3. 22. against provisors, is subject to the same penalty.

So, by the st. 27 Ed. 3. 1. all who draw any out of the realm in a plea, which pertains to the king's courts, or wherein judgment hath been there given; or sue in any other court to impeach a judgment in the king's court, &c. shall be out of the king's protection, forfeit their lands, goods, and chattels, and their bodies shall be imprisoned, and ransomed at the king's will.

So, if he sues in another court after judgment, whereby the cause is drawn *ad aliud examen*, though it be within the realm; as, if he sues in chancery, to defeat a judgment at common law. 3 Inst. 120. 123.

Or, before the president and council of Wales, commissioners of sewers, &c. 3 Inst. 124, 125.

So, if he sues in the ecclesiastical court, admiralty, &c. for a cause out of their jurisdiction. Per Fineux, 15 H 7. 9. R. 12 Co. 39, 40. 3 Inst. 121, 122.

So, by the st. 16 R. 2. 5. if any purchase from Rome, &c. a translation to a benefice, process to stay execution of a judgment in the king's court, sentence of excommunication, bulls, &c. Dav. 84, &c.

By the st. 2 H. 4. 4. if any purchase a bull to be discharged of tithes.

By the st. 1 & 2 Ph. & M. 8. if any molest any abbey-lands, &c.

By the st. 1 El. 1. the second offence, and by st. 5 El. 1. the first offence, if any by writing, teaching, &c. advisedly maintain the authority of the bishop of Rome within this realm.

Or, refuse the oath of supremacy prescribed by the st. 1 El. 1.

So, by the st. 13 El. 2. if any abet, &c. a publisher or receiver of bulls, &c. or bring in, or receive to wear, &c. an *Agnus Dei*, &c. or if a justice of peace, on discovery to him, reveals it not to the privy council in fourteen days.

So, by the st. 27 El. 2. if any send relief to a jesuit, &c. beyond sea.

By

By the st. 3 Jac. 4. if any, being not noble, and above eighteen, refuse the oath of allegiance, when tendered by the bishop, or the justices of the peace at quarter-sessions. 1 Bul. 197.

[By stat. 6 Geo. c. 18. called the bubble-act, projectors of unlawful undertakings; but the court has a power to moderate. Str. 472. 2 Ld. Raym. 1361.]

(C) What process against the offender.

By the st. 16 R. 2. 5. process shall be made against the offender by *præmunire facias*, in manner as is ordained in other statutes of provisors.

And by the st. 27 Ed. 3. 1. it was enacted that there shall be a writ to take the body and seise the lands and goods into the king's hands; and if returned *non est invent.*, he shall be put in *exigend.* and outlawed; but before outlawry, he shall be received to answer, if he yield himself to prison.

But an indictment for a *præmunire*, upon the st. 1 El. and 13 El. ought to say, that the defendant on purpose, and set intent to extol the authority of the see of Rome, &c. R. Dy. 363. a.

PRÆROGATIVE.

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## (A) The king's prerogative.

The king's prerogative comprehends all the liberties, privileges, powers and royalties allowed by the law to the crown of England. Co. L. 90. b. St. Prær. 5. Vide Roy, (A. 1, 2.)

For the king has not any prerogative, but such as the law allows. 12 Co. 76. 2 Inst. 496. 63. [Moor, 672. Show. P. C. 75. 4 T. R. 410.]

And by the st. of Marl. 52 H. 3. 5. and other confirmations of *magna charta*, it was enacted, *quod magna charta teneatur tam in his, quæ ad regem pertinent, quam ad alios*.

And therefore no prerogative of the king can be claimed, contrary to *magna charta*. 2 Inst. 36.

[The care and approbation of marriages in the royal family do belong of right to his majesty, as king of this realm. By all the judges of England, on a question proposed by the king. H. 4 G.]

[The education and care of the persons of the royal family, the ordering the place of their abode, and appointing their governors and governesses, and other instructors, attendants, and servants, do belong of right to his majesty, as king of this realm. By ten judges; against Price Baron, and Eyre Justice. Fort.]

[N. B. The question here was as to the king's grandchildren, but the arguments of the judges went to all persons of the royal family.]

[By st. 12 G. 3. c. 11. marriages of descendants of George 2d, (except issue of princesses married into foreign families,) without the king's consent, are void; unless, on twelve calendar months' notice to privy council, both houses of parliament do not declare their disapprobation. Vide Baron and Feme, (B 1.)]

## (B) Prerogative as to foreign nations.

## (B 1.) Sovereignty of the sea.

All the king's prerogatives relate to foreign states, or to his own subjects. The king and his progenitors have at all times been lords of the sea. 2 Rol. 168. l. 45. Vide Navigation.

And

And therefore the dominion of the whole sea which surrounds England belongs to the king. 1 Rol. 528. l. 15.

And this dominion extends to both shores of the sea. 2 Rol. 168. l. 45.

And the ligeance or dominion of the sea belongs to the king, as to his crown of England. 2 Rol. 170. l. 42.

And therefore the king gives licence to the men of Zealand, &c. to fish in his sea. 2 Rol. 170. l. 30.

To whom the property and soil of the sea belongs, vide Navigation (A—B).—To whom, the fishery, vide post. (D 50.)

(B 2.) Treaties.

The king has authority to send ambassadors, envoys, &c. to foreign states. Vide Ambassador (A).

(B 3.) Alliances.

To make leagues and alliances belongs to the king only. 7 Co. 25. b.

So, by articles of alliance, the private property or right of a subject may be bound; as, if A. bound to B. a subject of England, during a war between this kingdom and Denmark, pays the debt to the king of Denmark, by order of the state there, and by the articles of peace, all monies paid by the subject of the one prince, shall be quit by monies paid by the subjects of the other, and the parties that paid to either of the king's orders, shall be discharged against the creditor; if B. sues for such debt, A. shall have relief in equity. R. 1 Ca. Ch. 123. 173.

All leagues ought to be upon record inrolled in Chancery, whereby every one may know who are in amity or enmity with the king, and who not. 4 Inst. 152. 9 Co. 31. a.

By the st. 2 H. 5. 6. killing or robbing any, comprised in a truce or safe-conduct, was made high treason. But this was repealed by the st. 20 H. 6. 11. and afterwards all treasons, not within the st. 25 Ed. 3. were ousted by the st. 1 Ed. 6. 12. and 1 Mar. and all offences against a truce, and the king's safe-conduct, and now punishable by the st. 2. H. 5. 6. or by the admiral. Vide post, (B 5.)—Admiralty, (E 8.)

All offences contrary to amity or league, are to the great slander of the king, and damage of the whole kingdom. 2 Rol. 174. l. 45.

A league may be broken by levying war, or by ambassador or herald. 4 Inst. 152.

So, by a prohibition of all the commodities of the kingdom in amity. 2 Rol. 174. l. 5.

(B 4.) Reprisals; when granted.

So, if a foreign prince, or state, seizes, or spoils the goods of subjects of England, the king may make reprisal upon the goods of the other's subjects in this realm. 2 Rol. 114.

So, if a subject of a foreign prince or state takes or spoils the goods of a subject of England, and his sovereign, upon a letter of request to him by the king, refuses to do right, the king may, by his writ, arrest the body or goods of him who did wrong. 2 Rol. 175. l. 5. 4 Inst. 137. Reg. 129.

And if he who did the wrong is not found, or has no goods, &c. he may

may arrest the goods of other subjects of the same prince, within this realm. 2 Rol. 175. l. 10.

Or, the king may enable him, to whom the wrong was done, by letters of marque, the goods of other subjects of the same state, *mercere retinere et appropriare, quosque restitutio facta sit.* 2 Rol. 175. l. 20. Per Coke, 1 Rol. 175.

But a subject of the king cannot take the goods of the subjects of a prince in amity with the king, by force of letters of marque of another sovereign or state. R. 2 Vern. 592.

So, by the st. 4 H. 5. 7. if any attempt be made by the king's enemies on the liege people against the tenor of a truce, wherein is not express mention, that letters of marque and reprisal shall cease, the king shall grant letters of marque to the parties grieved, who may complain to the keeper of the privy seal, and he, on the complaint, shall make him letters of request, if desired, under the privy seal; and if, after request, satisfaction is not made, the chancellor, on demand, shall make him letters of marque under the great seal.

So, the king may repeal such letters of reprisal after peace established. 1 Ver. 54.

So, after a truce, or safe-conduct. 1 Ver. 54, 55.

Though there be a clause inserted, that they shall not be void upon a peace. 1 Ver. 54.

[By 13 G. 2. c. 4. the officers, seamen, and soldiers in a man of war, have the property of all prizes, in such proportion as the king shall direct by proclamation; and privateers, according to their agreement, without any deduction to the king, admiral, or others.]

[And by s. 15. five pounds shall be paid by the treasurer of the navy for every man on board an enemy's ship of war or privateer taken or destroyed, at the beginning of the engagement. And by stat. 17 Geo. 2. c. 34. s. 19.]

[By s. 18. if a British ship is retaken, it shall be restored on paying for salvage one-eighth of the value to a man-of-war; and to a privateer, if retaken in twenty-four hours, an eighth; in forty-eight hours, a fifth; in ninety-six, a third; and above ninety-six hours an half.]

[By stat. 17 Geo. 2. c. 34. ships of war have the sole property of prizes.]

[By s. 2. *et seq.* commissioners of admiralty to give commissions to privateers; and the method of proceeding on prizes are regulated.]

[If a prize be taken by two or more privateers they are to share proportionably according to the number of men of which their respective crews consist. Doug. 311.]

[By s. 16. the king may grant charters of goods and lands to be taken from an enemy by private adventurers.]

[By s. 20. English ships retaken from the enemy shall be restored to the owners, paying one-eighth of the value for salvage to a man-of-war; but to a privateer, if retaken in twenty-four hours, one-eighth; if in forty-eight hours, one-fifth; if in ninety-six hours, one-third; if above, one-half; and if converted into ship of war by the enemy, one-half.]

[Stat. 29 G. 2. c. 34. regulates the distribution of prizes, and 32 G. 2. 25. explains and amends it.]

[Stat. 18 Geo. 3. c. 15. contains regulations concerning prize-goods not the produce of North America.]

[Stat.

[Stat. 19 Geo. 3. c. 67. orders that prizes shall be distributed in the manner pointed out by his majesty's proclamation, during the war with France, under that act and proclamation; a captain of marines who happens to be on board a man of war, when she takes a prize, but does not belong to her complement, shares only as a passenger. Doug. 324.]

[The captain of a ship actually on board at the time of a capture is entitled to prize-money, though under arrest at the time, and though another officer had been sent on board to command the ship. 8 T. R. 224.]

[During the late war a flag-officer on a certain station gave orders to a ship under his command to sail on a cruize; after the orders were given, but before a prize was taken, he accepted another command; but no other flag-officer was appointed to succeed him on the former station. He was not entitled to one-eighth of a prize taken by the ship which sailed in consequence of his orders, under the proclamation for the distribution of prizes. 1 H. BL 261.]

(B 5.) Safe-conduct.

The king only can make letters of safe-conduct. 7 Co. 25. b.

By which he takes the party into his keeping and protection. Vide Reg. Or. 25. b.

And these letters of safe-conduct ought to be inrolled upon record in chancery. 4 Inst. 152. — By the st. 20 H. 6. 1. They are otherwise void.

And by the st. 15 H. 6. 3. they shall express the name of the ship, master, number of mariners, with the portage of the ship.

And by the st. 18 H. 6. 8. merchants may take ships of enemies, not having the letters patent of safe-conduct on board, or inrolled in chancery. Conf. by the st. 20 H. 6. 1. s. 3, 4. and 14 Ed. 4. 4.

No subject of a king, in enmity with the king of England, can come into the kingdom without the king's licence and safe-conduct.

So, a sovereign of another kingdom cannot come hither without the king's licence, though he be in amity; as the king of the Isle of Man before its subjection to the kingdom of England. 7 Co. 21. b. Calvin.

So, of ancient time, an ambassador, who was *prorex*, could not come without a safe-conduct. 4 Inst. 155.

But a subject of a king in amity may come without licence or safe-conduct. 7 Co. 21. b. Calvin.

By the st. 31 H. 6. 4. if a subject attaches the person or goods of any one who comes by way of amity, truce, or safe-conduct, the chancellor, calling to him any justice of the one bench or the other, on a bill of complaint, may make process against the offender; and may award delivery and restitution of the person, ship, or goods. Conf. by 14 Ed. 4. 4.

How breach of safe-conduct shall be punished. Vide ante, (B 3.) — Admiralty, (E 8.)

(C) Prerogatives in respect of the king's own subjects, in time of war.

(C 1.) To declare war.

The king's prerogative in respect of his subjects, relates to war or the

the time of peace; for the king has the sole authority to declare war or peace. 7 Co. 25. b. Vide ante, (B 3.)—Parliament, (H 24.)

(C 2.) To levy soldiers.

Antiently, every one bound by tenure to do any service to the king in his wars, ought to serve according to his tenure.

And in the time H. 6. and since, it was usual for any knight, or other, to make a covenant with the king by indenture, inrolled in the exchequer, to serve him with so many men named in a list, for so long a time in his war. Co. L. 71. a.

By the st. 11 H. 7. 1. & 18. it is said, that every subject, by the duty of his allegiance, is bound to serve and assist his prince in his wars, &c.

But a man is not bound to serve the king out of the realm, except for wages. 1 Roll. 166. l. 10. ad 30.

Nor can he be sent by the king out of the realm to serve there. 2 Inst. 47.

Though he be sent only to Ireland. Ibid.

Or be sent to be in an office, as deputy, captain, ambassador, &c. Ibid.

[The statutes here referable are collected in 1 Gab. 361. to 365., 367. to 372., 373. to 376., 377. to 379, 380., 384. to 385.]

[The right of impressing mariners for the sea-service, whenever the public safety requires it, is a prerogative inherent in the crown, grounded on the common law, and recognized by many acts of parliament. Foster, 154.]

[But this power must not be wantonly exercised by the officer employed in the impress service; an information was granted against one Webb for having impressed Captain Wager of a merchant ship to serve as a common seaman. 1 Bl. Rep. 19.]

[And there are certain exemptions.—Thus, the better opinion seems to be, that a bargeman protected by the navy board, while carrying timber to the king's docks, cannot be impressed by virtue of any warrant from the admiralty. 2 Bl. Rep. 1207.]

[The bargemen of the lord mayor of London are not privileged from being impressed if not employed in the act of rowing the lord mayor in his barge, though it might be an abuse of power to impress them in that situation. Cowp. 518.]

[Whether the possession of a landed estate to a small amount will exempt a mariner, is yet undecided. Vide 1 Bl. Rep. 251.]

[By 13 G. 2. c. 17. every person of fifty-five or under eighteen years, and every foreigner serving in a trading vessel or privateer, is exempted from being pressed.]

[By s. 2. every person, of what age soever he be, who shall use the sea, shall be freed and exempted from being impressed for the full space of two years, to be computed from the time of his first going to sea; and that every person who, not having before used the sea, shall bind himself apprentice to serve at sea, shall be freed and exempted from being impressed for the full space of three years, to be computed from the time of his binding himself apprentice as aforesaid.]

[And the admiralty to grant protections accordingly, without fee.]

[By

[By 15-Geo. 2. c. 28. s. 5. persons employed in the Greenland fishery exempt from being pressed.]

[By st. 19 Geo. 2. c. 30. mariners belonging to privateers or trading ships are not to be impressed in the West Indies, unless they shall have deserted from his majesty's ships; and the officer impressing, &c. subjected to a penalty of 50*l.* to the master or owner, to be recovered in any court of record within his majesty's dominions.]

[But in debt on this statute, the declaration must aver that the mariner had not deserted from any of his majesty's ships of war. 1 Term Rep. 141.]

[See the stat. 22 Geo. 2. c. 33. for the government of his majesty's ships, vessels, and forces by sea, and the case of Sutton v. Jolinson, 1 T. R. 493.]

### (C 3.) Command of the forces.

The government and command of the militia, and all the forces by sea or by land, and of all sorts belong only to the king.

And by the st. 13 Car. 2. 6. it was declared, that the whole supreme government, command, and disposition of them, by the laws of England, ever was the undoubted right of the kings and queens of England; and that both or either of the houses of parliament ought not to pretend to the same.

[By the acts of mutiny and desertion, the king's power to make articles of war is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or articles; therefore the courts here have no jurisdiction for a wrong done by an officer to a soldier there (as, for degrading him from being serjeant to a common soldier). 2 Wils. 314. Vide st. 26 Geo. 3. c. 107. the new militia act. As to billeting soldiers, vide 1 Bl. Rep. 350. Vide 2 Burr. 1149. 3 Term. Rep. 133. 37 Geo. 3. c. 33. s. 31.]

[The foot-guards may be billeted all over the kingdom as well as the other troops. 7 T. R. 724.]

### (C 4.) Building of forts, &c.

So, the king by his prerogative has the sole power of building castles, forts, &c.

And a subject cannot build a castle, an house with battlements, or any fortress, without the king's licence. Co. Lit. 5. a.

Vide War.

## (D) Prerogatives which regard time of peace.

### (D 1.) Enacting of laws.

The king's prerogatives, which concern times of peace, relate, 1. To the enacting of laws. 2. Jurisdiction. 3. The nomination of officers. 4. Trade. 5. The revenue.

And therefore, no statute can be enacted without the royal assent. Vide Parliament, (G 10. 21. — R 3, &c.)

But the king cannot alter the course of descent by his grant; as he cannot by his charter make land to be partible among all the children, which before descended to one. 2 Rol. 164. l. 5.

Nor,

Nor, grant that land shall be devisable. 2 Rol. 164. l. 7.

That a man shall hold his land, after his profession in religion. 2 Rol. 164. l. 10.

So, the king cannot by his grant alter the law in any respect; as, he cannot give power to any to oust another of his land. 2 Rol. 164. l. ult.

(D 2.) Proclamations :—When he may issue them.

So, the king by his proclamation may enforce the execution of laws.

And, therefore if the king by proclamation prohibits that which was before unlawful, the offence afterwards will be thereby aggravated. 12 Co. 75.

So, the king by his proclamation may admonish his subjects, that they do not offend, under the penalty of the law. 12 Co. 76.

So, by the st. 1 Jac. 25. the king may by proclamation restrain the transportation of any grain, generally, or from any particular ports.

And by the st. 12 Car. 2. 4. s. 12. the transportation of gunpowder, arms, or ammunition.

By the st. 31 H. 8. 8. the king, with the assent of the greater part of the privy council, might issue a proclamation, which should be obeyed as an act of parliament, and the offender to pay such forfeitures, and suffer such imprisonment as mentioned in the proclamation. But this is now repealed by the st. 1 Ed. 6. 12.

(D 3. a.) When not.

But the king cannot, by his proclamation, make a thing unlawful, which was before lawful; for the king cannot create an offence, by proclamation. 12 Co. 75.

And therefore nothing will be punishable after a proclamation, which was not so before. Ibid.

So, he cannot by proclamation alter any part of the common law, statutes, or customs of the realm. Ibid.

And therefore a proclamation for the suspension of the execution of a statute, till the next parliament, is illegal and void. Ibid.

A proclamation that none import wines of such a country, which is in amity, under the pain of forfeiture, will be void. 2 Inst. 63.

A proclamation that if the buyer of an horse in a fair or market, or out of a fair or market, in the county of N. do not pay toll, his horse shall be forfeited, is void. Sembl. but not determined. 2 Rol. 172.

So, none can make proclamation, but by the authority of the king, or lawful custom; for it is the prerogative of the king to issue proclamations. 12 Co. 75.

So, every proclamation ought to be *sub magno sigillo Angliæ*. Cro. Car. 180.

And it is most proper and safe to be so pleaded. R. Cro. Car. 180.

[(D 3. b.) Construction of.]

[The king's proclamation reciting, that certain facts had been represented to him, and offering a reward for the apprehension of those who committed them, assumes the existence of those facts. The offer of a reward necessarily implies and presupposes that the party offering

ing is satisfied that the event in question has happened. 4 M. & S. 532.]

(D 4.) Dispensation :—The nature and effect of it.

A dispensation makes an act, otherwise prohibited, lawful to him to whom the dispensation is granted; for *dat jus*. Vau. 333.

And this prerogative belongs to the king by the common law, in a case of necessity. Hard. 446. 448.

But dispensations are odious in law. 2 Rol. (179.) l. 25.

(D 5.) How it shall be made.

In a dispensation, the word *dispense* is not necessary; and therefore a dispensation to hold a plurality by the words, *unimus incorporamus*, &c. is sufficient. R. Cro. Eliz. 720.

(D 6.) In what cases the king may make a dispensation.

If an act of parliament regards only the king's benefit, he, by his prerogative, may grant a dispensation of the statute. 2 Rol. 179. l. 47.

In which case the king, in respect of place, time, or person, dispenses with a particular person, that he shall not incur the penalty of the statute. 7 Co. 36. b.

As, if a statute prohibits a thing only *sub modo*, or under penalty. Semb. Hard. 110.

So, where a statute limits a time for advancement of justice, the king may enlarge it; as, where the st. W. 2. 10. provides, that in the eye, proclamation be made for delivery of writs within fifteen days, or a month, the king may enlarge the time by his dispensation. 2 Inst. 377.

So, if a prohibition by a statute be general, yet, in respect of the inconvenience to particular persons, though a remedy be given for the penalty to the king alone, or by action popular, the king may dispense with the particular persons. 2 Rol. 179. l. 35.

As, if the king lets lands to the vicar of W. in farm, to the intent that he maintain hospitality, *non obstante* any statute. Semb. Sav. 22.

(D 7.) In what not.

But the king cannot dispense with a thing, being *malum in se*. Hard. 448.

As, that a simoniac may take a benefice. Hard. 445. 3 Inst. 154.

Nor, with a thing, which would be a nuisance. Hard. 444, 445.

So, the king cannot dispense with a thing, against which the subject may defend himself by law.

So, the king cannot dispense with any thing, in which the subject has an interest. Hard. 449.

And therefore he cannot change or dispense with the common law, by his charter: as, if he grants that an alien shall inherit, it will be void. 2 Rol. 115.

That land of the nature of gavelkind shall descend to the eldest son. 2 Rol. 115.

So, the king cannot dispense with *magna charta*, which is incorporated into the common law. Ibid.

Nor, with the st. 13 & 15 R. 2. 3. & 5. or 2 H. 4, 11. which restrain the incroachments of the admiralty. 4 Inst. 135. 137. Vide infra.

Nor, with a statute for the benefit of the church, or the public good ; for every subject has an interest in it. As the st. 5 & 6 Ed. 6. against the sale of offices. 3 Inst. 154.

Or, the statute which requires the oaths of allegiance and supremacy. Ibid.

So, the king cannot dispense with an act of parliament, by which the subject has benefit. 2 Rol. (179.) l. 50.

As, if a statute prohibits a foreign manufacture *pro bono publico*, to the intent that the people here may make the manufacture, the king cannot dispense with it. 2 Rol. (179.) l. 40. R. 11 Co. 88.

The st. 15 R. 2. provides that the admiral shall not hold plea except of a thing done *super altum mare*; the king cannot dispense that he shall hold plea *à primis pontibus usque ad mare*: for the statute was made for the public good. 2 Rol. (179.) l. ult.

So, the king cannot dispense with the st. 27 Ed. 3. that merchants aliens, but not denizens, might export merchandize of the staple. 2 Rol. (180.) l. 5.

Nor, with the st. 5 El. 4. that the indenture of apprenticeship of a mariner shall be inrolled in the next town-corporate, to make it to be inrolled in the corporation of Trinity-house. R. 9 Lev. 389.

Nor, with the statute against recusants. R. Hard. 110.

Though the remedy be given to the king for the benefit of the subject.

[By 1 W. & M. st. 2. c. 2. s. 12. a dispensation by *non obstante* to any statute shall be void, except a dispensation be allowed of in such statute.]

#### (D 8.) Pardon.

So, the king may pardon all offences, of which a man is attainted, or convicted. Vide Pardon (A).

So, all offences within the jurisdiction of the spiritual court.

So, if a man be excommunicated for a contempt, and the king grants a general pardon, whereby the contempt will be pardoned, the excommunication is avoided: and if he be taken upon an *excommunicato capiendo*, he shall be discharged. R. 2 Rol. (178.) l. 45. Adm. 2 Lev. 36.

But the king cannot reverse a judgment against a criminal without legal process. 2 Rol. 164. l. 50.

#### (D 9.) Prerogative as to jurisdiction ecclesiastical.

The king has full prerogative and jurisdiction to do justice and right to all within his kingdom, in all causes ecclesiastical, or civil. 5 Co. 8. b. De Jur. Eccl.

And may correct and reform all crimes, abuses, and enormities within his kingdom. 5 Co. 9. b. De Jur. Eccl. 2 Rol. 230. l. 5. Vide Visitor, (A 1.)

By the st. 37 H. 8. 17. the parliament recognises that the king is supreme head on earth of the church of England, and hath full power and authority to punish and repress all manner of heresies, errors, vices, sins, abuses, idolatries, hypocrisies, and superstitions within the same,

use, and to exercise all manner of ecclesiastical jurisdiction. And this was before enacted by the st. 26 H. 8. 1. Vide post, (D 17.)

But the st. 26 H. 8. 1. and 37 H. 8. 17. were repealed by the st. 1 and 2 Ph. & M. 8. and afterwards by the st. 1 El. 1. all statutes there mentioned are revived; among which was the said st. 37 H. 8. 17.

And by the st. 8 El. 1. it is allowed, that king Henry VIII. by the clergy in convocation, and by the lords spiritual and temporal and commons in parliament, was rightfully acknowledged to have the supreme power, jurisdiction, &c. over all the estate ecclesiastical, and the same did use accordingly.

And all ecclesiastical jurisdiction began originally by the grant of W. 1. or rather by parliament; for before, ecclesiastical causes were determined in the hundred. 2 Rol. 216. l. 20.

The jurisdiction of the bishops, &c. began by the king's grant. 2 Rush. 1343.

The supreme ecclesiastical authority is inherent in the king, and a flower of his crown. Hob. 143. Vide post, (D 17.)

Wherefore he may by *mandamus* command the ecclesiastical judge to do right; as to swear a churchwarden, sexton, &c. chosen according to custom. R. 2 Rol. 234. l. 15. 35. Vide *Mandamus*, (A).

To grant administration, probate of a will. 2 Rol. 234. l. 90.

So, before the st. 16 Car. 11. he could grant an high commission for the correction of abuses, &c. which was not founded upon the st. 1 El. 1. but by the antient power of the crown explained and declared by that same statute. R. 2 Cro. 37. 2 Rol. 219. l. 30. Vide *Courts*, (N 1.)

So, the king as sovereign of the realm ought to endeavour that nothing be done to the disherison of the crown, or propagation of a false religion: and therefore, he may exhibit an information for the discovery of a superstitious use. R. 1 Sal. 163. Vide *Uses*, (M).

#### (D 10.) Ecclesiastical laws.

As to the usurpation of ecclesiastical jurisdiction by the pope, and how restrained, vide *Ecclesiastical Persons*, (B 1.) — Popery. What are ecclesiastical laws, vide *Canons*, (C). — Convocation, (E).

The ecclesiastical laws, though derived from others, yet being approved and allowed here by general consent, are the king's ecclesiastical laws. 5 Co. 9. a. De Jur. Eccl. Dav. 70. b.

And by the st. 25 H. 8. 21. England is subject to no laws, but such as are made within the realm, or by long use, and free consent the people have bound themselves to the observance of. Vide *Canons*, (C).

And therefore the ecclesiastical laws are made within the realm, or adopted by usage and custom.

Before the Conquest, the king, with the assent of the clergy, and since the Conquest, in convocation and provincial synods, have made constitutions; all which are part of the ecclesiastical laws at this day. Dav. 72. b.

And such constitutions, with the king's assent, are good laws for the government of the clergy, without the parliament. R. 2 Cro. 37. R. Mo. 783. in ecclesiastical matters.

But a bishop, or other ordinary, cannot, without a canon or custom,

tom, command a layman to observe any new rule or ceremony. Per two J. Houghton cont. 2 Rol. 221. Q.

(D 11.) Are within the power of the king.

Forasmuch as the ecclesiastical laws are the king's laws, the interpretation and execution of them belongs to the king, and his ministers. Dav. 70. b. Vide Canons, (C).

So, the king has power to dispense with the ecclesiastical law. R. Dav. 73. a. 70. b.

And therefore may exempt from the visitation and jurisdiction of the ordinary. Dav. 73. a. Vide Visitor, (A 7.)

He might of common right, before the st. 25 H. 8. 21. grant a dispensation *in commendam*. Dav. 73. Vide post, (D 18, &c.)

He might dispense with a bastard to be a priest. Hob. 147.

So, the king may pardon an offence contrary to a canon, or the ecclesiastical law. Dav. 73. a.

And such pardon shall be a bar in all suits *pro salute animæ*, or *reformatione morum*, and all suits *ex officio* in the ecclesiastical court. Dav. 73. a. Vide Pardon, (E 1.)

What causes belong to ecclesiastical conusance, or not, vide Prohibition, (A 2. — F 1, &c. — G 1, &c.)

As to the jurisdiction and proceedings in ecclesiastical courts, vide Courts, (N 1, &c.)

(D 21.) Censures ecclesiastical.

So, the king, and commissioners appointed by him, may pronounce sentence of deprivation, or other ecclesiastical censures, pursuant to the common law used in this realm. Semb. 2 Cro. 37. R. Mo. 755.

And where a bishop takes caution by obligation, he ought to take it in the name of the king. Per Wild, 2 Lev. 36.

So, the king and his commissioners may pass a censure, pursuant to a canon, though there be a high commission for the same offence. Poph. 59.

But an ecclesiastical judge cannot impose a pecuniary mulct or fine for an offence. 2 Rol. 216. l. 35. Vide Poph. 60.

(D 1 3.) Appeals : — In what court an appeal shall be.

By the st. 24 H. 8. 12. All causes testamentary, of matrimony, divorce, tithes, &c. shall be finally determined within this realm, without appeal, &c. to the see of Rome, or other foreign court; and any who procure such appeal, &c. shall incur a *præmunire*. Conf. by the st. 25 H. 8. 19.

And by common law, appeals were determined within the realm, without appeal to Rome. 2 Rol. 293. l. 25—35.

By the st. 24 H. 8. 12. if a cause be begun before an archdeacon or his official, the appeal shall be to the bishop of the diocese. Vide 4 Inst. 339.

If commenced before the bishop diocesan or his commissary, to the archbishop of the same province. 4 Inst. 339.

[An appeal lies from the ordinary about setting up ornaments in a church, and if the ordinary, as archdeacon, was also commissary to the bishop, the appeal is to the metropolitan. Str. 1080.]

If

If before the archdeacon of any archbishop, or his commissary, to the court of the arches, or audience of the same archbishop, and from that court within fifteen days after sentence there, to the archbishop of the same province.

If the king be concerned, the appeal shall be to the upper house of convocation. 4 Inst. 339, 340.

And by the st. 25 H. 8. 19. appeals shall be made in the same manner in all causes, of what nature soever.

An appeal from the bishop, or his commissary, to the archbishop in his court of arches, is good; though this is not the proper court; for these words, "in his court of arches," shall be rejected as superfluous. R. Dy. 240. b.

So, an appeal lies from the dean or commissary of the archbishop in his exempt jurisdiction, to the court of arches or audience by the common law; for it is not within the st. 24 H. 8. 12. Ought. Tit. 275.

So, it lies *à delegato ad delegantem*, viz. from the commissary or official of a bishop, to the bishop himself. Ought. Tit. 274.

(D 14.) To the delegates.

By the st. 24 H. 8. 12. causes commenced before any of the archbishops of Canterbury or York, or brought before them by way of appeal, shall be finally determined by them, without other or further appeal.

But by the st. 25 H. 8. 19. for lack of justice in any of the courts of the archbishops, it shall be lawful for the parties grieved to appeal to the king in chancery, and on such appeal, a commission under the great seal shall be directed to such as shall be named by the king, (as in case of appeal from the admiral's court,) to hear and definitively determine such appeal, with all circumstances concerning the same, whose sentence shall be definitive.

And by the same statute, appeals from the governors of abbeys, or other places exempt, shall be made to the king in chancery (as before to the pope) immediately, and be by such commissioners definitively determined.

And therefore, in all ecclesiastical causes, an appeal lies to the delegates. 4 Inst. 339.

[It is discretionary in the court of chancery, whether they will grant a full commission of delegates, (*i. e.*) to lords spiritual and temporal, judges at common law, and civilians, or to judges and civilians only. 3 Atkyns, 798.]

[Where the jurisdiction of bishops is in controversy, or a question depending which concerns the canon or ecclesiastical law, a full commission is granted; where it is a mere matter of law, as a question on a will, it issues to judges and civilians only. *Ibid.*]

[One interested in a sentence may have a commission of delegates to review, though no party to the original suit. 1 Atkyns, 298.]

The king may appoint whom he pleases to be the delegates.

And afterwards may add others by a commission of adjuncts. Raym. 475.

If any of the judges are in the commission, the place of assembly is usually appointed by one of them at Serjeants' Inn. Raym. 476.

[On an appeal on a collateral point, the court of delegates may, instead

instead of remitting the cause to the arches, retain it *ad instantiam partis*, and hear it on the merits. Str. 80.]

The delegates ought to proceed according to the ecclesiastical laws, and they cannot fine or imprison. 4 Inst. 334. Conf. by st. 13 Car. 2. 12.

They may excommunicate. R. 2 Rol. 233. l. 10. Cont. 2 Bul. 4.

So, if they repeal an administration granted by an inferior judge, they may grant administration. Semb. Latch, 85. 2 Rol. 233. l. 10. Vide Administrator, (B 2.) R. cont. 2 Bul. 4.

But an appeal does not lie to the delegates upon a sentence of deprivation by a visitor of a college; for this is a temporal matter. 4 Inst. 340. Dy. 209. a.

Or, by visitors constituted by special commission. 4 Inst. 340. 2 Rol. 232. l. 50.

As to an appeal to the delegates in marine cases, vide Admiralty, (G).

To parliament, from chancery, vide Parliament, (L 7.)

To a visitor, vide Visitor:

To the pope, vide Popery, (A 3. — B 2.)

#### (D 15.) To the convocation.

By the st. 24 H. 8. 12. In causes testamentary, or of marriage, divorce, tythes, &c. which may touch the king, the appeal shall be to the upper house of convocation of the same province. Vide Convocation, (D).

#### (D 16.) Commission for review.

Though by the st. 24 & 25 H. 8. The sentence of the delegates is final, yet the king may grant a commission of review; for this is not restrained by the same acts, and the pope, as supreme head, (whose authority is now annexed to the crown by the st. 26 H. 8. 1. and 1 El. 1.) had power to do it. R. 4 Inst. 341. R. Mo. 462. Cro. El. 571.

So, though a decree by the high commission had no appeal, yet the king, by a special commission, might have examined it. 2 Rol. 233. l. 20. Adm. Mo. 782.

But a commission of review is *ex gratiâ*, and not of right. Mo. 782.

If an appeal be just, the superior judge ought to receive it. 4 Inst. 340.

And the king cannot take away the benefit of an appeal. Ibid.

An appeal lies *à sententiâ definitivâ vel decreto interlocutorio habente vim sententiæ definitivæ per procuratorem vivâ voce* immediately upon sentence given. Ought. Tit. 289. 295.

Or, within fifteen days after sentence, in writing before a notary public. Ought. Tit. 295, 296.

So, an appeal lies *à gravamine* before sentence; which ought to be in writing, and specify the *gravamen*. Ought. Tit. 277. 285.

If an appeal be lawfully made, the inferior judge cannot proceed; for his authority is suspended. 4 Inst. 340. 6 Co. 18. b.

So, by an appeal the sentence is suspended. 2 Rol. 233. l. 40.

If an appeal be from a sentence of excommunication, the party might

might *celebrare missam*, may sue actions, &c. pending the appeal, 2 Rol. 233. l. 42.

And where a sentence is afterwards revoked and annulled upon a citation, without appeal, all mesne acts are good. R. 6 Co. 18. b.

So, if the commission of an inferior judge has the words *appellatione remota*, he may proceed to the execution of his sentence, till the appeal received, and an inhibition sent to him. 4 Inst. 340.

So, if after sentence, the party be excommunicated for not performing it, and then he appeals; though the sentence be thereby suspended, the excommunication is not suspended. R. Mo. 850.

In an appeal from a definitive sentence (not upon a *gravamen*) each party may *non allegata allegare, et non probata probare*.

If there be an appeal to a superior judge, he ought to give the same sentence that the inferior ought; as if they repeal an administration granted by an inferior judge, the delegates may grant administration. Latch, 85. Vide ante, (D 14.)—Administrator, (B 2.)

So, if the superior judge revokes the former sentence, he ought to reverse all the mesne acts done after the appeal to the prejudice of the appellant. 4 Inst. 340.

#### (D 17.) Supremacy in ecclesiastical affairs.

By the st. 16 R. 2. 5. of *Præmunire*, the crown of England is subject to none, but immediately unto God.

And by the st. 25 H. 8. 21. the kingdom of England recognizes no superior under God but the king. Vide Dav. 61.

And this was only a declaration of the common law. Mo. 782.

And therefore the king of England is *supremum caput ecclesie Anglicane*. Vide Ecclesiastical Persons, (A).

This title of supreme head of the English church, was first attributed to the king by the clergy in convocation. 20 H. 8. Co. Lit. 7. a.

And was afterwards used by the king. 22 H. 8. Ibid.

By the st. 26 H. 8. 1. the king, his heirs, and successors, shall be reputed the only supreme head on earth of the church of England, and shall have, united to the imperial crown of this realm, as well the title and style thereof, as all honours, dignities, jurisdictions, &c. to the same belonging, &c.

By the st. 37 H. 8. 17. the same title was recognized by parliament. Vide ante, (D 9.)

But those statutes were repealed by the st. 1 & 2 Ph. & M. 8.; yet afterwards by the st. 1. El. 1. that statute of repeal was repealed, as to all statutes by this revived, and the statute 37 H. 8. 17. is thereby expressly revived.

And by the st. 1. El. 1. all jurisdictions, privileges, &c. spiritual or ecclesiastical, by any spiritual or ecclesiastical power, or authority lawfully used, for the visitation of the ecclesiastical state or persons, reformation, order, or correction of the same, and of all errors, heresies, schisms, &c. shall be for ever annexed to the imperial crown of this realm.

And therefore all ecclesiastical jurisdiction, though usurped by the pope, was now restored to the crown. 4 Inst. 325. Vide Ecclesiastical Persons, (A—B 1.)

So, by the st. 1 El. 1. [the queen, by letters patent under the great seal,

seal, may authorize such persons, being natural-born subjects, whom, when, and as long as she pleases, to exercise all spiritual and ecclesiastical jurisdiction within her dominions, and to visit, reform, correct, &c. all errors, heresies, schisms, abuses, &c. which, by any spiritual or ecclesiastical power, &c. may be lawfully reformed, &c.] (Repealed by 16 Car. 1. 11.) Vide Courts, (N 1.)

So, ecclesiastical courts may be held in the name of the ordinary, without the king's patent. 2 Rush. 451. Cont. 2 Rush. 1344. Acc. 12 Co. 7. 2 Rush. App. 278.

And all process may issue under the seal of the ordinary, and needs not the great seal, or other seal of the king. 2 Rush. 451.

Though by the st. 1 Ed. 6. 2. it was enacted that all process ecclesiastical shall be made in the name of the king, and have no other seal than what hath the king's arms, &c. for that statute is now repealed. R. 12 Co. 7.

(D 18.) Dispensation *in commendam*:—When a dispensation is necessary.

By the antient ecclesiastical law, a bishop could not have or hold a benefice with cure within his diocese; for if he had such, it became void when he was created a bishop. Dav. 68. p. Vau. 19, 20.

So, by acceptance of a second benefice with cure, by the common law the first became void. Vide Esglise, (N 5.)

And therefore, in these cases, a dispensation was necessary for retaining the first benefice.

A dispensation *in commendam* is *semestris*, *temporaria*, or *perpetua*. Hob. 144.

*Semestris* is for six months after voidance, till presentation; and therefore lawful. Ibid.

So, a perpetual *commendam*, or for life, to take, with the consent of the patron, may be allowed in some cases; for it is in the nature of a provision. Hob. 153.

Otherwise, of a temporary *commendam*. Hob. 153. 155.

(D 19.) By whom it may be granted:—When by the king.

But the king may grant a dispensation to a bishop elect, before consecration, to retain his benefice *in commendam*, by the common law. R. 2 Rol. 233. l. 50. Hob. 143. Dav. 73. Hob. 147.

So, the king may grant all dispensations since the st. 85 H. 8. vide post, (D 20.) in the same manner as before; for though the statute says, all dispensations shall be granted in manner following, and not otherwise, the king is not thereby restrained. Hob. 146.

And therefore the king now may grant a dispensation *retinere in commendam*.

And this may be for years, or *quamdiu* he is a bishop; for it continues the former incumbent for a time. Hob. 156.

So, it may be *tenere* a deanry, prebend, or other dignity *in commendam*. 2 Rol. 451.

(D 20.) When not:—And when a dispensation may be granted by the archbishop, or not.

Yet a dispensation *capere in commendam* a church, then full of an incumbent, cannot be granted. Hob. 150.

By

By the st. 25 H. 8. 21. every dispensation, licence, &c. shall be granted in manner following, and not otherwise, viz. the archbishop of Canterbury shall have authority by instrument, under the seal of the archbishop, to grant all dispensations, &c. necessary for the profit of the king and his realm, so as he grant none for any cause repugnant to the law of God.

But shall grant none but in cases accustomed to have such by the authority of the see of Rome, without licence of the king, by bill signed.

And all dispensations of importance, which paid 4*l.* for expedition at Rome, (and of the tax of all dispensations at Rome) two books shall be made, one to remain with the register of the faculties, the other with the clerk in Chancery, shall be confirmed under the great seal.

And all other prelates may dispense, &c. in the same manner as they could by the common law, or the custom of the realm.

And therefore, in cases in which it was generally allowed the pope might grant a dispensation, the archbishop now may grant a dispensation by this statute. Hob. 146.

And therefore the archbishop may grant a dispensation to take a plurality, within the st. 21 H. 8. Vau. 20.

But the archbishop cannot grant a dispensation by this statute, except in *spiritualibus*, in which the pope was allowed to grant *quasi de jure*. Hob. 147, 148.

So, the archbishop is restrained from granting dispensations in four cases where the pope granted them; as, by the statute itself he is restrained in cases repugnant to the divine law. Hob. 147.

And therefore he cannot grant it for a prohibited marriage. Hob. 147, 148.

Nor, for an alien, who does not speak English, and reside, to be a priest. Hob. 148.

Nor, for benefice to be appropriated to a nunnery. Hob. 148.

2. He cannot grant it in any case contrary to the st. 21 H. 8. against pluralities. Hob. 147. Vide *Eglise*, (N 5. 8.)

3. Nor, in cases contrary to the king's prerogative, or the laws and statutes of the realm. Hob. 148.

And therefore a dispensation *capere in commendam* any churches not above such a value, without mentioning that they are void, though made by the archbishop, and confirmed by the king, is not good. R. Hob. 150.

Or *capere*, without expressing a provision for the consent of the patron. Hob. 152.

So, 4. The archbishop by this statute cannot grant a dispensation, except in cases convenient and necessary, upon examination of the cause, and quality of the person. Hob. 148.

And therefore a dispensation by the archbishop, with the confirmation of the king, *capere in commendam* for years, or *quamdiu* he shall be a bishop of such a see, &c. will be void: for he is not a complete incumbent, and other inconveniences ensue. Hob. 153. 155.

(D 21.) Deprivation:—For what causes it shall be.

Every offence by an ecclesiastical person, contrary to the duty of his function, may be punished by the spiritual court. 1 Sal. 134.

So,

So, he may be deprived for a crime. 1 Salk. 134, 135.

A bishop, by the archbishop of his province, as well as a parson, vicar, or other ecclesiastical person of an inferior order, by his ordinary. 1 Sal. 135.

So, a deprivation may be by ecclesiastical commission, as well as by the bishop, or other ordinary, R. Jon. 393.

And therefore a parson, &c. may be deprived, if he be an heretic. Dal. 51.

If he depraves the common prayer. R. Poph. 60.

If he be an infidel or miscreant, which signifies a misbeliever.

So, by the st. 13 El. 12. if he advisedly and directly maintain doctrine repugnant to the 39 articles, and being convented before his ordinary, &c. shall not revoke his error; or, after revocation, affirm such untrue doctrine.

So, if he be a schismatic.

So, by the st. 1 El. 2. if he refuse to use the book of common prayer, or to administer the sacraments according to it, or use other form, or prayers, &c. or speak or preach in derogation thereof, having formerly been convict for the like offence.

Or, by the st. 14 Car. 2. 4. if he read not morning and evening prayers publicly on some Lord's-day within two months after his induction, and declare unfeigned assent to the use of all things contained in the book of common prayer; or, in case of lawful impediment, within a month after the impediment removed.

So, if he be convict for any non-conformity.

So, if he be obstinately disobedient to the lawful canons of the church.

As, if he takes an incompatible benefice, without a dispensation.

If he takes a benefice by a simoniacal contract. 1 Sal. 134.

If he be a common drunkard. R. 1 Brownl. 70. 2 Brownl. 37. Win. Ent. 219.

So, he may be deprived for the first offence in depravation of the common prayer; for the statute, being in the affirmative, does not take away the effect of the canons. R. 4 Co. de Jur. Eccl. 3. 5. 2 Rol. 222. l. 30.

So, if he be incorrigibly disobedient to his ordinary.

So, if he be guilty of murder.

Or, before the st. 18 El. 7. if he was convict of any homicide, and could not purge himself. 2 Rol. 222. l. 15.

So, since the st. 18 El. 7. if he be convict of manslaughter by verdict; for though the statute ousts the purgation, it does not take away the offence. 2 Rol. 222. l. 20.

So, if convict for perjury in the spiritual court for a spiritual matter. Per Holt, 1 Sal. 134.

Or, forgery of orders. 1 Sal. 134.

So, if he be *merè laicus*. R. Dy. 293. Bend. pl. 234.

So, he may be deprived for dilapidation of the church. 1 Sal. 134, 135.

If an abbot had aliened lands, which he had in right of his abbey. 2 Rol. 222. l. 10.

### (D 22.) The effect of a deprivation.

A sentence of deprivation. though it be for nullity of institution and induction,

duction, as that the presentee was *merè laicus*, does not relate to make an avoidance *ab initio* so as to give a lapse to the bishop. 2 Rol. 220. l. 20.

Or, to make the institution and induction of a clerk by A. after the institution of the presentee deprived, but before his deprivation, to be good. 2 Rol. 220. l. 10.

Or, to make a marriage, administration of the sacraments, or other spiritual act by him, void. R. Cro. El. 775. Mo. 606.

Or, to make a lease by him, confirmed by the patron and ordinary, to be void. R. Cro. El. 775.

But if, after deprivation, the party deprived be restored by lawful commissioners, the sentence of deprivation is annulled, and the incumbent continues, and a presentation upon such deprivation does not supply its turn. R. Mo. 558.

If a deprivation be by the king, or his commissioners, who represent his person, an appeal does not lie; but the king, of grace, may grant a commission of review. Mo. 782.

(D 23.) Seizure of temporalities:—The nature of temporalities.

The king is patron of all the bishopricks in the kingdom, which are of the king's foundation. Vide Ecclesiastical Persons, (C 2.)

So, all the bishops of Wales are of the patronage of the king, and he ought to grant their temporalities to them. 1 Rol. 882. l. 5.

So, the bishops of Ireland. F. N. B. 169. G.

The temporalities of a bishop are all his temporal possessions, which belong to the bishopric. Sav. 52.

And during the vacancy of the bishopric, they belong to the king. 2 Inst. 15. Mod. 207.

And the king is seised of the freehold. 1 Rol. 881. l. ult.

And shall have the profits, take a ward, present to a church, &c. Vide Eaglise, (H 5, 6.)

But by M. Ch. 9 H. 3. 5. *custodiæ archiepiscopatum, episcopatum, &c. vendi non debent.*

And therefore a subject cannot claim those temporalities by grant, or prescription. 2 Inst. 15.

So, by M. Ch. 5. the king shall restore the temporalities in the same plight as he had them. 2 Inst. 14.

And a commissioner of *oyer and terminer* goes, to hear a trespass done in the vacation. 2 Inst. 152.

So, a common person shall have the temporalities of an abbey, &c. of his foundation. 2 Inst. 68.

(D 24.) How granted.

After a bishop is elected and confirmed, the king makes restitution of the temporalities to him. Bur. H. 11.

So, he may grant them after election, and before consecration. 1 Rol. 882. l. 15.

If the king limits no estate in the temporalities, yet the bishop shall have the fee. 1 Rol. 882. l. 20.

So, though the king limits only for life, or years; for that will be void. 1 Rol. 882. l. 20.

If a bishop elect accepts rent reserved upon a lease by his predecessor, the lease shall not be affirmed by such acceptance. Pal. 175.

But

But till a writ for restitution of the temporalities to the bishop, they are not vested in him, though he be a complete bishop. 1 Rol. 881. l. 50.

So, after restitution, the bishop shall not have an action for a trespass done in the vacation; for the st. Marl. 29. does not extend to him. 2 Inst. 152.

So, if an election be without the king's assent and licence, he may refuse restitution. F. N. B. 170. C.

(D 25.) How seised.

So, for an enormous offence in a bishop, his temporalities may be seised *in manus regis*. 2 Rol. 228. l. 20.

As if he be attainted for trespass *contra pacem*; for, being a prelate, a *capias* does not lie against his person. 2 Rol. 228. l. 25.

Or, for a contempt, as upon an attachment in prohibition. 2 Rol. 228. l. 15. 30.

Or, for not admitting a varlet to his corody. 2 Rol. 228. l. 15.

So, if he be found a disturber in a *quare non admisit* by the king, 2 Rol. 228. l. 17.

Or, be found guilty in a *quare incumbavit*, after a *non admittas* delivered to him. 2 Rol. 228. l. 10.

So, upon the death of a bishop, the king by his prerogative shall have his palfrey, bason, and ewer, and kennel of hounds; and process shall issue for them, if not compounded. Sav. 53.

(D 26.) Guardian of the spiritualties:—Who shall be.

During the vacation of a bishop or metropolitan, the spiritual jurisdiction belongs to the guardian of the spiritualties. Lind. 33. v. Vicar. Gener.

And the dean and chapter, of common right, is guardian of the spiritualties to a metropolitan, as to the archbishop of Canterbury. 2 Rol. 223. l. 7. 22. But the prior of Christ-church, Canterbury, is said to be so. Ibid. l. 20. 50.

So, to the archbishop of York. 2 Rol. 223. l. 25.

So, in inferior bishoprics, the dean and chapter, of common right, is guardian of the spiritualties, and not the metropolitan. 2 Rol. 223. l. 10. But this seems to be by composition. Temp. H. 3.

But where the usage allows it, the metropolitan shall be guardian of the spiritualties; as the archbishop of York shall be to the bishop of Durham. 2 Rol. 223. l. 17.

So, by prescription, an archbishop may be guardian of the spiritualties to a bishop within his province. Lind. 33. v. Vicar. Gener.

So, by composition, *per aliquem* by the archbishop, *electum ex nominat. per capitulum*. Lind. 33. v. Vicar. Gener.

(D 27.) What he may do.

The guardian of the spiritualties regularly may exercise all spiritual jurisdiction. Sav. 52.

As, he may make admission and institution. 2 Rol. 223. l. 40.

So, a writ shall be directed to him for trial of bastardy, &c. and he shall make a certificate of it. 2 Rol. 223. l. 44. Vide Certificate, (A 4.)

So,

So, he shall prove wills, grant administration, licences for marriage, &c. Sav. 52.

(D 28.) Jurisdiction temporal : — Erection of courts.

The king, by his prerogative, may make what courts for the administration of the common law, and in what places, he pleases. Vide Courts, (A).

But the king cannot erect a court of chancery, or conscience; for the common law is the inheritance of the subject. 2 Rol. 164. l. 30. Vide Chancery, (A 3.)

Nor, grant a liberty *tenere placita*, according to the course of the civil law. 2 Rol. 164. l. 25.

Nor, grant that the court of York shall hold plea, by English bill, of an obligation, or other matter triable at the common law. R. 2 Rol. 164. l. 32.

Nor, grant that such an one shall not be impleaded by action. 2 Rol. 164. l. 20.

So, the erection of a new court, with a new jurisdiction, cannot be without an act of parliament. 4 Inst. 200.

And if it be erected, the jurisdiction ought to be expressed; for nothing omitted shall be within such jurisdiction. Ibid.

So, the king cannot grant to a court, that it may proceed according to the civil law. 2 Rush. App. 77.

Nor can, by charter or commission, &c. alter the common law. Ibid. For the appointment of justices. Vide post, (D 37.)

(D 29.) Grant of commissions.

The king may grant such commissions as are warranted, or allowed, by the common law, or by act of parliament. 4 Inst. 163. 2 Inst. 51. Vide Justices, (C 2.—G 1, &c.)

Commissions are general, as to persons, crimes, &c. as a general commission of *oyer and terminer*. 4 Inst. 162.

Or, special, when confined to particular persons, offence, or place. 4 Inst. 163.

As, upon a heinous trespass done, which requires *festinum remedium*. Reg. 123. By the st. W. 2. 13 Ed. 1. 29.

Upon heinous exactions, &c. by a bishop and his ministers. Reg. 125. b.

But the king cannot grant a commission not usual, nor allowed by act of parliament. 4 Inst. 163. 2 Inst. 478.

And therefore, by the st. 18 Ed. 3. st. 2. 1. (Q. if not expired? vide *Cay's Statutes*.) a commission of new inquiry is declared void.

So, by the st. 18 Ed. 3. st. 2. 4. a commission for assaying weights and measures.

So, a commission for making of boats, &c. 4 Inst. 163.

So, a commission to apprehend a felon, and seise his lands and goods. 2 Inst. 54.

So, the king cannot grant a commission for inquiry only, without power to hear and determine. R. 12 Co. 31. Semb. 2 Rol. 164. l. 47.

So, a commission ought to specify the offences in the commission, not in the schedule annexed. R. 12 Co. 31.

So, a commission for a trespass done shall be only to the justices of the one bench, or the other, or justices in eyre. Stat. W. 2. 29. st. 2 Ed. 3. 2. Vide Justices, (E 1, &c.—G 1, &c.)

And it shall not be in English. R. 12 Co. 31. (By the st. 4 Geo. 2. 26. all commissions, &c. are to be in English.)

(D 30.) Grant of franchises and liberties.

So, all franchises are derived from the king; and therefore the king may grant to another to have any franchise or liberty. Vide Franchises, (A 1.)—Liberties.

As, a county palatine, or jurisdiction temporal or ecclesiastical. Vide Franchises. Vide ante, (D 9, &c. 28, 29.)

Nomination of his officers; as sheriff, coroner, &c. Vide London, G—K 1, &c.)

So, the execution of things incident to the office of another; as, *retorna brevium*. Vide Return.

*Quod uti possit regalibus libertatibus in manerio suo.* 2 Rol. 202. l. 35.

*Omnem potestatem, omnes libertates, et consuetudines, quæ regia potestas conferre potest, omne jus, et omne dominium quod ad nos pertinet, &c.* 2 Rol. 199. l. 20.

(D 31.) Of nobility and honour.

So, the king, by his prerogative, is the fountain of all dignity and honour in his realm. Vide Dignity, (A).

So, he may, by the common law, compel persons of 20l. per annum inheritance to be knights. Vide Homage, (G 4.)

Or, persons named to be serjeants, to take the degree. 2 Rol. 167. l. 10. Vide Ley, (D 2.)

(D 32.) Of privileges,

So, all privileges are derived from the king; and therefore the king may grant to another to have the privilege of a forest, chase, warren, park, &c. Vide Chase.

To have a fair or market, or toll in it. Vide Market, (C 1, 2.)

To have casual profits; as wreck, waifs, strays, deodands, treasure-trove, royal fish, mines, derelict land, &c. Vide post, (D 49, 50.)—Waife.

So, privileges in trade. Vide Trade, (B).

(D 33.) Of exemptions.

So, the king, by his grant, may exempt a subject from a charge, which by his grant he may impose; as, he may grant to the citizens of any town, &c. to be quit of toll for their merchandize in every town and city of England. 2 Rol. 198. l. 37. 45. Vide Toll, (G 2.)

So, he may grant an exemption from toll in the king's market, though due by prescription. R. 2 Jon. 119.

So, the king, by grant, may exempt citizens from all *tallagiis, auxiliis, vigiliis, et contributionibus ratione terrarum et merchandisarum*, in a city. 2 Rol. 199. l. 5.

From customs and tallages. 2 Rol. 199. l. 25.

*De auxiliis vicecom. de foresta.* 2 Rol. 199. l. 1.

So, *de vastis, assart. and regard. forestæ.* 2 Rol. 199. l. 2.

To be quit *de foresta.* 2 Rol. 202. l. 5.

So,

So, he may grant exemption from a summons before justices in eyre.  
2 Rol. 198. l. 40.

From service *in iurat, assisis, &c.* 2 Rol. 199. l. 5.

So, the king may grant exemption from an office; as *quod non sit* mayor, alderman, sheriff, escheator, coroner, &c. Ibid.

[Constable, or any other office under the crown, provided there be a sufficient number of persons left to serve the office. 1 Term Rep. 686.]

But an exemption from the office of constable, and other offices in the Cinque Ports, does not exempt him from the office of sheriff.  
R. Sav. 43.

So, an exemption from offices in the Cinque Ports does not exempt from the office of sheriff in a county. Ibid.

So, the king may grant an exemption from attendance upon courts of justice; as, of the shire, hundred; *de sectis* of shire and hundred.  
2 Rol. 198. l. 52.

*De placitis forestæ.* 2 Rol. 199. l. 1.

So, the king may grant an exemption from a charge in which the king has no interest at the time of the grant; as, to a spiritual man, that he shall be discharged of tithes, when they shall be granted by the clergy. 2 Rol. 198. l. 25.

To a man that he shall not be impeached by a recognizance, into which he shall afterwards enter. 2 Rol. 168. l. 30.

But the king cannot grant an exemption from the jurisdiction of any court, if he does not erect another jurisdiction of the same nature; for that would be a failure of justice; as he cannot exempt a town from the admiralty jurisdiction, if he does not grant a power to have a like jurisdiction there. 2 Rol. 201. l. 45.

So, he cannot grant a power to hold a court of equity; for that would be in derogation of the common law. 2 Rol. 192. l. 37. Hob. 63. Vide Chancery, (A 8.)

So, if he grants an exemption from the shire and hundred, the grantee has thereby frank-pledge and tourn within his own land.  
Semb. 2 Rol. 203. l. 20.

So, the king cannot grant to any to be exempt from punishment for any offence; as, for felony, trespass, &c. 2 Rol. 192. l. 32. 35.

So, if the king grants an exemption from customs, that exempts him only from the antient customs, which were the king's inheritance.  
Van. 161.

So, a grant of exemption from all taxes, impositions, &c. does not exempt from such armour, &c. as he ought to find by act of parliament. R. Sav. 52.

#### (D 34.) Inhibitions to restrain within the kingdom.

So, the king, at his pleasure, may command any subject that he shall not go beyond sea, or out of the kingdom, without his licence.  
F. N. B. 85. A. 3 Inst. 179. Vide Chancery, (4 B.)

And if he does contrary, he shall be fined to the king for his contempt. F. N. B. 85. A. C.

And such inhibition may be by proclamation; for the party may abscond. F. N. B. 85. C.

Or, by writ, under the great seal, privy seal, or signet; for every one is bound to take notice of each of the king's seals. F. N. B. 85. A.

And

And such writ may be directed to the party himself, commanding him not to go out of the kingdom. F. N. B. 85. B.

Or, to the sheriff, commanding that he take surety of him *quod ne exeat*, and if he refuses, to commit him to gaol. F. N. B. 85. D. Vide 3 Inst. 179.

So, it may be directed to justices of peace, as well as to the sheriff, or to both. F. N. B. 85. E.

Every one upon surmise to the chancery, may sue this writ for the king. F. N. B. 85. F. Vide Chancery, (4 B).

So, the king, for the service of his war, or other reasons of state, may lay an embargo upon a ship. Per Saunders, Skin. 93.

Adm. in case of emergency. Skin. 335.

So, he may inhibit a public nuisance. Semb. Skin. 630. Vide post. (D 36.)—Action upon the Case for a Nuisance, (D 4.)—Prohibition, (A 3.)

But by the common law, every one, not restrained by writ or proclamation, might go out of the realm to merchandize, or for other cause, at his pleasure. F. N. B. 85. A. Dub. Dy. 165. 3 Inst. 179. R. Dy. 296. a.

And the st. 5 R. 2. 2. which restrains all, except lords, merchants, and soldiers, is repealed by the st. 4 Jac. c. 1. s. 22.

So, if the king grants licence for a time certain, it cannot be revoked. Dy. 177.

#### (D 35.) To recal a subject, who is out of the kingdom.

So, if a subject goes out of the kingdom without the licence, or with the licence of the king, and a messenger, by command under the great or privy seal, summons him to come back into the kingdom, and he does not return at the limited time, he forfeits all his goods and lands to the king for his contempt. R. Dy. 128. b. 3 Inst. 179.

And this extends to every subject ecclesiastical, or lay lord, or other. 3 Inst. 179.

If a messenger serves such command, he ought to make a certificate of it in chancery upon his oath; and if such certificate be transmitted to the exchequer by *mittimus*, a commission goes to seize his lands and goods. 3 Inst. 180.

But merchants may abide beyond sea, though it be not to merchandize. Ibid.

A king in amity with the king of England, need not deliver up subjects of this realm who fly to him. Ibid.

#### (D 36.) To restrain annoyances.

So, the king, by his prerogative, may command the mayor and bailiffs of any city or borough, or town corporate, *quod omnes vicos et venellas in villa prædict. de finis et aliis fæditatibus mundari et mundat. conservari faciant*. F. N. B. 185. D.

And if it be not done, there shall be an *alias*, *pluries*, and attachment. F. N. B. 185. D.

But such writ does not lie for villages in the country, not corporate. Ibid.

But the king cannot inhibit a lawful occupation upon pretence of  
2 incon-

inconveniencies ensuing; as he cannot suppress the making of cards within the realm. R. 11. Co. 87. b. Vide Trade, (D 1.)

Or, the making of dice, bowls, balls, &c. though they serve only for pleasure. 11 Co. 87. b.

Or, the making of hawks' hoods, bells, &c. dogs' couples, &c. Ibid.

So, the king cannot restrain the exercise by foot-ball, casting the bar, cock-fighting, *aut alios vanos ludos*. 11 Co. 87. b.

(D 97.) Nomination of officers.

The king, by his prerogative has the nomination of all public officers within his kingdom. Vide Officer, (A 1.—E 1, &c.)

As, of the chancellor, treasurer, &c. Vide Chancery, (B 1.)—Courts, (D 8.)

Though claimed by parliament, 15 Ed. 3. 2 Rol. 164. l. 45.

But the king cannot create a new office, with a fee to be taken of the subject, without the assent of parliament; for that would be a tallage upon the subject without his consent in parliament. 2 Inst. 533.

And therefore where the king by letters patent made an officer for the measuring of cloth and canvas, with a new fee for it, the grant was void. 2 Inst. 533.

Or, for measuring worsteds. 2 Inst. 534.

Or, for registering inventories, births, aliens, &c. R. 12. Co. 116.

So, the king cannot erect an ancient office with a new fee to be taken of the subject. 2 Inst. 533.

So, the king cannot make a new office by letters patent, for the survey or correction, &c. of any thing within the jurisdiction of another court. 4 Inst. 262.

As, for the issuing *latitats*, &c. 12 Co. 117.

Or, the registering of judgments, recognizance, fines, or deeds, &c. Ibid.

Or, for the inspection or examination of accounts, deceits, &c. by the officers of any court. Ibid.

How officers are created, and their authority and duty, vide title Officer.

(D 38.) Prerogative as to trade.

So, the king by his prerogative, may erect societies for the management of trade. Vide Trade, (B).

So, for the public good, the king may grant an embargo upon a merchant ship, &c. 1 Sal. 32. 3 Lev. 353.

But an embargo shall not be allowed, if done for the benefit of a private trader or company. R. 3 Lev. 353. 1 Sal. 32.

So, the king cannot grant a seizure of a ship or goods, if it trades without licence of such a company (admitting that he can give the sole trade there to a company). R. Skin. 135.

Neither can he give the forfeiture of goods by charter; and therefore, if the king grants power to the dyers to search cloths, and if they find any dyed with logwood, they shall be forfeited, it shall be void. 8 Co. 125.

When the king shall take reprisals, vide ante, (B 4.)

## (D 39.) Prerogative as to the king's revenue :—Coinage.

The king alone, by his prerogative, can make or coin money within his dominions. R. Dav. 19. Vide Money, (B 5.)

And the benefit of coinage was part of the king's revenue.

And the duty, temp. Ed. 3. was 5s. out of every pound of gold, out of which the king paid 1s. or 18d. to the master of the mint. Upon every pound of silver 8d. in weight, or 1s., out of which the king allowed to the master 8d. or 9d. Hale Sh. Acc. 3.

Temp. H. 5. the duty for coinage of a pound of silver was 15d. Hale Sh. Acc. 3.

By stat. 9 Geo. 3. c. 25. the coinage duties in stat. 18 C. 2. &c. are made perpetual.

## (D 40.) Aids, &amp;c.

The king, by his prerogative, is entitled to have aid *pur faire son fitz chivaler, ou son eigne file marier*. Mad. 396. Vide Aide, (A). Vide the st. 12 Car. 2. 24. whereby this is taken away. Vide Parliament, (H 9.)

## (D 41.) Purveyance :—In saltpetre.

The king by his prerogative had the privilege of purveyance for defence of his realm, or provision of his household.

As, the king has purveyance of saltpetre for gunpowder, though it was invented only in the time of R. 2.; for it would be to the peril of the kingdom, if he could not take it within his dominion, but must apply for it to foreign princes. R. 12 Co. 12, 13.

And therefore the king's ministers may dig for saltpetre to make gunpowder for the safeguard of the realm, in the lands, stable, ox-house, or cellar of a subject. R. 12 Co. 13.

In the ruins of buildings. 12 Co. 14.

And may throw down mud-walls, if the house be well defended. Ibid.

But he cannot dig where he cannot leave the place in the same plight as before, without prejudice to the owner; as, in the floor of a mansion-house. R. 12 Co. 13. R. 2 Rol. 169. l. 10.

Nor, in the floor of a barn, where corn or hay lies; for it would be useless for a long time. 12 Co. 13.

Neither can he impair the wall or foundation of any house, out-house, &c. 12 Co. 13.

And where he digs, he ought afterwards to put it in as good plight as before. 12 Co. 13, 14.

So, in cellars he cannot remove the vessels of the owner, and in stables, &c. must leave room for his horses and cattle, &c. 12 Co. 14.

He cannot fix a furnace, &c. upon his soil, where it may prejudice him, without his consent. R. 12 Co. 14.

So, he ought to dig in convenient time before sun-set. Ibid.

And cannot return to dig at the same place in a long time. 12 Co. 14.

And the owner cannot be excluded from digging for saltpetre also, in his own soil. R. 12 Co. 14.

So, the king cannot grant, demise, or assign such privilege to another; for it is inseparable from the crown. R. 12 Co. 13. R. 2 Rol. 187. l. 40.

And saltpetre dug for the king ought to be employed for the defence of the realm. R. 12 Co. 13.

(D 42.) In

(D 42.) In other necessities.

The king cannot take gravel in the land of a subject without his consent, for repairing of his palace. 12 Co. 12.

Nor, timber, &c. 12 Co. 12.

Nor, to make a wall, bridge, &c. about his royal house. Ibid.

[By st. 12 Car. 2. c. 24. none by authority under the great seal, &c. shall purvey, &c. for the king, queen, their children, or household, any timber, fuel, cattle, grain, hay, victual, carts, carriages, &c. without free consent of the owner, &c.]

(D 43.) Customs:—*Magna custuma*.

The customs upon merchandize, exported and imported, are the ancient inheritance of the crown. Dav. 8. a. 10. b. Dy. 43. b. Vau. 161, 2. said, that they were originally granted by parliament. Vide Parliament, (H 11.)

And they comprehend that which is known by the name of *magna et antiqua custuma*, viz. 6s. 8d. for every sack of wool. 6s. 8d. for every 300 woolfells, and 13s. 4d. for every last of hides. Dav. 8. Vide Parliament, (H 11.)

And this custom was as ancient as the crown itself. Dav. 8. b. But semb. that it began by parliament, 3 Ed. 1. 2 Inst. 59. 4 Inst. 29. Vau. 162. Forst. 15.

The same custom granted in Ireland. 2 Rol. 177. l. 10. 35.

And upon a stranger the custom paid was 10s. for a sack of wool; 10s. for 300 woolfells, and 20s. for a last of hides. 2 Rol. 178. l. 15.

(D 44.) *Parva custuma*.

*Parva, sive nova custuma*, were granted by charter, 31 Ed. 1. Before which the king took as much as he pleased. Dav. 8. b. 9. b.

By which charter it was ascertained, that the king should take only 3d. per pound of merchants strangers for all goods imported or exported. Dav. 8. b. 2 Rol. 178. l. 25. besides 2s. *pro dolio vini* 40d. *pro sacco lanæ, lasto cor.* and 300 woolfells, &c. Vide the charter, Forst. 22.

And there shall be two receivers chosen for it in every town and port. 2 Rol. 176. l. 50.

[This duty was discontinued by the 24 G. 3. c. 16., which act however, contains a saving for the duties granted by charter to the corporation of London.]

(D 45.) *Prisage*, &c.

*Prisage* is a duty of two tons out of a ship laden with twenty tons of wine, or more; one to be taken before the mast, the other behind the mast. Dav. 8. b. 4 Inst. 30. 1 Rol. 145. Mad. 525. 3 Bul. 3. 21.

It was insisted, that there ought to be two tons of a ship laden with thirty tons of wine; but the king granted that it should be taken as usual. 2 H. 4. 2 Rol. 162. l. 35.

*Butlerage* is 2s. per ton for every ton of wine paid by merchants strangers

strangers in lieu of prisage, which was remitted to them by charter, 31 Ed. 1. Dav. 8. b. 4 Inst. 30. 1 Rol. 145.

And ought to be paid when the ship comes into port, and breaks bulk. 1 Rol. 140. 144. 3 Bul. 4.

And the customs shall not be accepted till the prisage delivered. Sav. 33, 34.

So, it shall be paid for wine imported by a corporation, though a grant be, that none shall be taken *de bonis civium*; for this extends only to the goods of each citizen in his natural capacity. 1 Rol. 142.

So, for wine, which a citizen and others jointly import. Ibid.

For wine which the executor of a citizen imports. 3 Bul. 4.

Or, which a citizen, as executor, imports. Ibid.

Or, which a citizen imports, who has not his habitation in the city. 3 Bul. 9. 14.

But the barons of the Cinque Ports claim to be free of prisage by prescription. 2 Rol. 163. l. 27. Hard. 308.

So, others may be exempt by prescription. 1 Rol. 146.

So, persons may be exempt by the king's grant, 1 Rol. 142.; as, the citizens of London are exempted for wine imported there, but not for wine imported elsewhere. R. Hard. 310.

And the exemption shall be allowed, though the citizen dies before bulk broken. Hard. 302. Noy, 97. 3 Bul. 1—26.

So, a man by the king's grant, may have the benefit of prisage. Dub. 2 Rol. 187. l. 37. 1 Rol. 142.

So, no duty shall be paid for prisage, if under ten tons be *bonâ fide* imported; as, seven or eight tons. Hard. 477.

Or, nine tons, unless there be an express proof of fraud. Ibid.

Yet, where nine tons and an half were imported, it was decreed that prisage should be paid; for it is an apparent fraud. R. Hard. 57. 218. 477.

So, no duty, if ten tons laden, by leakage, are reduced to nine tons. Hard. 477.

So, it shall not be paid, except where the wine is imported from a foreign kingdom by a merchant, and not for private use. 1 Rol. 145.

#### (D 46.) But other customs not allowed.

But by the st. 25 Ed. 1. 7. the *maletolt* upon wools, &c. shall be abolished. Vide Parliament, (H 9. 15.)

And by the st. 36 Ed. 3. 11. nothing shall be taken but the antient custom. 2 Rol. 177. l. 25.

#### (D 47. a.) Customs not paid by a patentee.

If the king grants to B. goods seized by him from pirates, no customs shall be paid by the patentee; for the king shall not pay customs to himself. R. 2 Rol. 180. H. Lane, 15.

So, the king may grant to a merchant alien to be exempt from all customs, except such as a subject pays. Vau. 161.

#### [(D 47. b.) Land-tax.]

[The land-tax in England, which was an annual tax, has been made perpetual by the 38 G. 3. c. 60., subject however to redemption and purchase

purchase in the manner therein mentioned, and by 48 G. 3. c. 102., special commissioners are appointed for carrying into execution such of the powers and provisions of the 38 G. 3. c. 5. The period in which deeds relative to the redemption of the land-tax were required to be enrolled or registered by the 50 G. 3. c. 58., was extended by the 52 G. 3. c. 80., and the several acts for the redemption and sale of the land-tax, are explained, amended, and rendered more effectual by the 53 G. 3. c. 123., and c. 142., and by the 54 G. 3. c. 173., and 57 G. 3. c. 100.]

[*Malt-tax.* — The annual malt-tax was first imposed by the 8 & 9 W. 3. c. 22., and by the 12 Ann. st. 1. c. 2., was placed under the management of the commissioners of the excise. The 1 Geo. 3. c. 3., is entitled ‘An act for continuing and granting to his majesty certain duties upon malt, mum, cyder, and perry, for the service of the year 1761,’ and this duty, which was granted and continued by this and subsequent statutes, is continued by the 48 G. 3. c. 2. from June 23. 1808, to June 24. 1809. — And additional perpetual excise of *3d.* a bushel on malt made in England, and of *1½d.* on malt made in Scotland, was laid on, by the 33 G. 2. c. 7., and a further duty of 15*l.* per cent, upon the produce of the duty so payable by this act, was added by the 19 G. 3. c. 25. — The 57 G. 3. c. 5. E. & W. is the last act continuing the temporary duties upon malt; but the 52 G. 3. c. 128., G. B. as amended, by 53 G. 3. c. 9. G. B. contains permanent provisions for better securing the duties on malt.]

(D 48.) Impositions, &c.

So, the king by his prerogative may charge an imposition upon the subject for his benefit; as, he may grant a certain rate for things sold in a town, *pro muragio* of the town, or *pro ponte reparanda*, or for the security *partium illarum*. 2 Rol. 171. l. 45. 50. 172. l. 5. 12 Co. 12. Vide Toll, (A).

And may grant it for a limited term, and that then it shall cease. 2 Rol. 171. l. 40. 50. 172. l. 5.

So, that a man shall make the wall of a town, or a bridge, *de novo*, and shall take so much for goods sold, or which pass there. 2 Rol. 171. l. 25.

So, that any person may erect a ferry upon a water next to his land, and shall take so much for passage. 2 Rol. 171. l. 30.

So, the king may grant to another to have toll in his market, &c. 2 Rol. 202. l. 42. Vide Market, (F 1.)

But the king cannot charge the subject with an imposition, where he has no benefit by it, or a *quid pro quo*. 2 Rol. 272. l. 40. 2 Inst. 220.

So, he cannot charge a new impost upon any merchant. 2 Inst. 58.

Nor levy new customs. 2 Inst. 60.

Nor enlarge the antient customs. Ibid.

So, a grant by the king, that a merchant, who imports wine at any other port than the port of S. shall pay treble customs, is void. 2 Inst. 61.

So, the king cannot grant, that a merchant shall pay so much for searching or measuring his goods. 2 Inst. 62.

That he shall not import wine without paying so much, on pain of forfeiture. 2 Inst. 63.

That a merchant shall pay 5s. per cent. for all currants, or other foreign commodity, imported. 2 Inst. 63. R. cont. in Exch. 4 Jac. Lane, 30. 2 Rush. 73.

So, merchants cannot by their consent grant to the king a tax upon their goods; for their wares would thereby be sold the dearer. 2 Rol. 173. l. 20. 25.

(D 49.) Casual profits : — The goods of no person.

The king, by his prerogative, is entitled to all goods which have no owner, 4 T. R. 243.; as, wreck, *flotsan, jetsan, legan, &c.* of which, vide Wreck, (A).

So, to waives, strays, &c. Mad. 234. Vide Waife, (A 1, 2. — F). To goods forfeited, or confiscated, *bona felon., fugitivor., utlagator., et in exigent. positor., &c.* Vide Waife (B — C — D).

To deodands, treasure-trove, &c. Vide waife (E 1, 2. — G).

To lands, &c. which escheat. Vide escheat.

Or, come to the king by forfeiture, seizure, &c. Mad. 202. Vide Forfeiture, (B 1, &c.)

So, to wards, marriages, reliefs. Mad. 216.

(D 50.) Royal mines and fishes.

As, to royal mines, vide Waifes, (H 1, 2.)

By the common law, and now it is declared by the st. *prær. regis* 11. *rex habebit wreckum maris, balænas, et sturgesiones capt. in mari, vel alibi infra regnum.* Pl. Com. 315. 7 Co. 16. a. Dav. 56. a. Stamf. Prær. R. 38.

So, the fishery of every navigable river, as high as the sea flows and reflows, belongs to the king, by his prerogative. 2 Rol. 170. l. 20. Dav. 56. Dougl. 441—446. (425—429.)

But every one may fish in the sea, of common right. (Mod. Ca. 79.) Though it flows upon the soil of another.

But foreign nations cannot fish in the British seas, without the king's licence. Vide ante, (B 1.)

So, a man, by grant or prescription, may have a free fishery in navigable rivers. Cal. 26. Vide Pischary, (A).

So, a man, by grant or prescription, may have a several fishery. Cont. Mod. Ca. 79. (Sal. 357.)

So, he may claim royal fish, as *balænas et sturgesiones*, within his manor.

So, by grant he may have a free fishery in a bay or creek of the sea. Dav. 57. a.

So, rivers not navigable, and the fishery in them, of common right belong to the terre-tenants *ex utraque parte*. Dav. 56. a. 2 Rol. 170. l. 25.

Or, if it runs between two manors, the one lord has one moiety, and the other the other moiety. Dav. 57.

As, to remedy for encroaching on the fishery of another, vide Pischary,

(D 51.)

(D 51.) Fines : — Fine upon an original.

As to a fine *pro licentia concordandi* upon a fine levied; vide Fine, (E 8.)

As, to a fine for alienation without licence, or pardon of such alienation by the king's tenant, vide Alienation, (A 1, 2.)

A fine shall be paid in the hanaper for the king's writs. 8 Co. 59. b.

As, upon every original in a real action shall be paid in the hanaper 6s. 8d. for every parcel of land in demand, which is of the value of five marks per ann. 2 Inst. 511.

So, antiently a fine was paid for liberty to have right and justice. Mad. 293. But by the st. M. Ch. 29. *nulli vendemus*, &c.

To have an inquisition taken upon any particular point in dispute, Mad. 700.

For expedition, or respite of proceedings in law. Mad. 308, 309.

But by the st. M. Ch. 9. H. 3. 26. & 29. it was provided, *quod nihil de cetero detur pro brevi inquisitionis ab eo qui inquisitionem petit de vita aut de membris* (viz. for the writ *de odio et atia*, 2 Inst. 42.) *sed gratis concedatur*.

*Nulli vendemus, nulli negabimus, aut differemus justitiam, aut rectum*,

So, by the st. 8 Ed. 3. no fine shall be for a writ of course, and grace shall be for a writ *de gratia*. Cot. Ab. 15.

(D 52.) For beau-pleader, &c.

So, there was an antient revenue of the king, to have a fine for beau-pleader, which was set at the will of the judge of the court, or reduced to certainty by consent, and annually paid. H. Sh. A. 35.

And it was originally imposed for bad pleading to the count or plaint, which was in delay of justice, and therefore a contempt to the court. 2 Inst. 123.

But by the st. Marl. 52 H. 3. 11. All fines for beau-pleader in eyre, county, hundred, or court-baron, are taken away.

And a writ lies if they are taken contrary to such statute. 2 Inst. 123.

Yet fines certain for beau-pleader are not taken away by that act. 2 Inst. 123.

So, a fine for suit. H. Sh. A. 35.

For not attending the sheriff's tourn. Ibid.

For assart, or purpresture, in the king's waste or forest. H. Sh. A. 36. Vide post, (D 54.)

Fines in the county-court, tourn, or other court of the sheriff. H. Sh. A. 43. Vide Leet, (N 1, &c.)

(D 53.) For a grant of liberties, &c.

So, there was an antient revenue of the king, to have a fine for a grant of liberties. Mad. 272. 588.

And if the fine proffered was not accepted, he might make an augmentation, which was called *crementum finis*. Mad. 273.

So, to have an office or surrender it. Mad. 315.

To be bailed, or delivered out of prison. Mad. 341.

But if he had not the thing, for which the fine was proffered, the party should be acquitted of the fine; though sometimes a fine was paid for such acquittance. Mad. 272.

## (D 54. a.) For a misdemeanor.

So, the king by his prerogative, might fine persons, having 20*l.* per ann. who refused to be knights. Vide Homage, (G 4.)—Leet, (N 1, &c. — O 1, &c.)

Or, persons who refused to take the degree of serjeant, when commanded by the king's writ. 2 Rol. 167. l. 15. Vide Ley, (D 2.)

So, a fine may be imposed for the penalty of an offence, or contempt, committed against the king. Co. L. 126. b. 8 Co. 59. b.

By whom it may be imposed, for what cause, and in what manner, vide Leet, (N 1, &c. — O 1, &c.)

A fine may be imposed, where a man is indicted and convicted for any trespass or misdemeanor.

Or, for purpresture, or other trespass in a forest. Mad. 272. Vide ante, (D 52.)

## [(D 54. b.) Penalty.]

[A moiety of a forfeiture in a popular action, vested by judgment in the crown, is a breach of the revenue, for which the crown has priority of process, and is entitled to stop all suits concerning it in any other court than the exchequer. 1 Anst. 221.]

## (D 55.) Fines, &amp;c. belong to the king.

The king, by his prerogative, shall have all fines paid for writs, or imposed for crimes.

And therefore, if upon a conviction for extortion, a man be fined to pay so much to the party grieved, (unless where by act of parliament it is directed,) it is error. R. 11 Car. 1. 1 Rol. 220. l. 10.

And a fine shall not be allowed by the court to the patentee of the king, till the patent pleaded, or an order by the court of exchequer. Skin. 12.

## (D 56.) By whom levied, and how.

The sheriff, by his office, ought to collect, and account for all fines due to the king within his county. Vide Viscount, (C 5.)

If an under-sheriff having process for levying an amercement due to the king by A. be indebted to A. by bond to a greater sum, and he pays to A. the surplus, and takes up his bond; the debt is levied, and A. ought to be discharged. R. Lane, 74.

[Justices of peace ought in all cases to return convictions to the sessions, whether an appeal lies or not, that the crown may not be deprived of its share of the forfeitures. 2 Term Rep. 285.]

## (D 57.) When they shall be estreated.

So, if fines belong directly to the king, they may be estreated into the exchequer; as, a fine imposed in the king's leet. Hard. 471.

[When a recognizance is estreated in B. R. it must be carried to the exchequer by the puisne judge. Fort. 358.]

[When a fine on an indictment is estreated, it cannot be discharged without attorney-general's acknowledging satisfaction in the exchequer. Bunb. 40.]

[B. R.]

[B. R. cannot receive a fine set by an inferior court. Str. 786.]

[By the st. 32 G. 2. c. 14. post-fines shall be paid to the receiver of pre-fines at the alienation-office, who shall pay them to the sheriff or the grantees, on producing *quietus*, or schedule, of the foreign opposer.]

By the st. 22 & 23 Car. 2. 22. all fines, post-fines, issues, amerciaments forfeited, recognizances, monies paid in lieu or satisfaction of any of them, and all forfeitures whatsoever set, &c. in B. R., C. B., or exchequer, from the beginning of Hilary term to the beginning of Trinity term, shall be estreated into the exchequer yearly, the last day of Trinity term; and all others shall be estreated the last day of Hilary term, on pain of 50*l.* to the officer, who ought to estreat, &c.

Provided that issues and post-fines in C. B. and issues in the office of the pleas in the exchequer shall be termly certified, as before.

And all set, &c. by a judge of assize, clerk of the market, and commissioners of sewers, between Michaelmas and Easter, shall be estreated before the first day of Trinity term, and all others before the first day of Hilary term, on the like penalty.

And all clerks of the peace, and town-clerks, shall deliver to the sheriff within twenty days after Michaelmas, a perfect estreat of all set, &c. at their sessions before Michaelmas; and those at other sessions on the second Monday after *Cras Animarum* yearly, on the like penalty.

And no officer shall discharge, or conceal, or wittingly miscertify any fine, &c. on pain of treble the value.

And when a fine, &c. is estreated, &c. process of green-wax shall go forth for levying the same.

By the st. 4 & 5 W. & M. 24. this act was made perpetual.

¶ And by the st. 3 Geo. 15., over and above the said penalties, the barons of the exchequer may amerce any clerk of assize, of the peace, of the sewers, market, town-clerk, &c. for omitting to return estreats in due time; to be levied as other amerciaments used in the said court to be levied.

[By st. 4 Geo. 3. c. 10. the barons of exchequer, on affidavit and petition, may discharge recognizance estreated, without a *quietus* sued, except where other debt is due to the crown, or for contraband trade, or assaulting officers.]

### (D 58.) Amerciaments.

So, the king, by his prerogative, shall have all amerciaments; and this was part of the king's revenue. Mad. 365. Vide Leet, (O 1, &c.)

So, the king, by his patent, may grant all issues, amerciaments, &c. by general words. 2 Rol. 194. l. 40.

And they shall be estreated into the exchequer, and the grantee shall sue to the court there by petition. Semb. 9 H. 6. 27. b.

Otherwise, if the grant adds, to be levied, *per se aut ministros suos*. Semb. 9 H. 6. 27. b.

But the patentee shall not have, by those general words, issues, fines, or amerciaments in any court of Westminster, without express mention of them. 2 Rol. 196. l. 5.

Nor, before justices of peace, in eyre, assize, or gaol-delivery. 2 Rol. 196. l. 5.

Nor, before the Marshalsea, or clerk of the market. 2 Rol. 196. l. 5.  
Nor,

Nor, fines, amerciaments, &c. of constables or other officers, not expressly named. 2 Rol. 196. l. 10. 1 Rol. 142.

Nor, amerciaments of tenants, who hold of the king and another. 1 Rol. 142.

Nor, pains, &c. inserted in a *subpoena*, injunction, *habeas corpus*, or other writ. Hard. 377.

(D 59.) Escheats, wardships, primer seisins, &c.

The escheat of all lands, which are held of the king, belongs to the king. Vide Escheat, (A. 1, 2.)

As, of all lands in London; for they are held of the king. F. N. B. 144. G.

So, if a man be attainted for high treason, the escheat of all his lands belongs to the king, of whatever lord they are holden. Vide Forfeiture, (B 5.)

By the stat. Prær. R. 17 Ed. 2. 12. the king shall have the escheat of the lands of all Normans and aliens, *cujuscunque feodi fuerint*; and this was only an affirmance of the common law. Stamf. Prær. R. 38.

So, by the stat. Prær. Reg. 17 Ed. 2. 14. the king shall have the escheat of the tenants of a bishop, for an offence *tempore vacationis cum temporalia sunt in manu regis*.

And the king shall have the escheat, if the offence was when the temporalities were in the king's hands; though they were restored before conviction. Stamf. Prær. R. 41. b.

So, by the stat. Prær. Reg. 17 Ed. 2. 1. the king shall have the wardship of lands, which his tenant *in capite* by knight's service had in his seisin at his death, *de quocunque tenuerit, usque plenam aetatem heredis*.

And by the st. Prær. Reg. 17 Ed. 2. 2. he shall have the marriage of every one whose lands he hath in ward.

And this, though there be a devise to charitable uses. R. Jon. 428.

So, by the common law, confirmed by the stat. of Marl. 52 H. 3. 16. & Prær. Reg. 17 Ed. 2. 3. the king shall have *primer seisin* of all lands of which his tenant in chief was seized in fee. Stamf. Prær. 12. [Vide the st. 12 Car. 2. 24. whereby all wardships, liveries, *primer seisins*, *ouster le mains*, values and forfeitures of marriage, &c. are taken away.]

(D 60.) Forfeitures, penalties.

So, the king, generally, shall have all forfeitures for high treason. Vide Forfeiture, (B 1, &c.)

And the king, by privy seal, may enable a court to compound, or discharge such forfeitures.

Or, after forfeiture, may grant the penalties to another. 7 Co. 37.

But such grant will be void before the penalty forfeited. R. 7 Co. 37. [Vide st. 1. W & M. st. 2. c. 2.]

So, the exchequer, having a privy seal to compound, may compound after such grant. R. Hard. 334. 395.

[The barons of exchequer (by the privy seal) may discharge a penalty fixed by statute (after judgment) as well as a fine set by the judgment of a court. Parker, 165.]

The king cannot grant the penalty to be levied otherwise than the statute directs. 7 Co. 37.

[The

[The crown, or its grantee, on forfeiture takes the estate, subject to all charges, binding the party, though voluntary, if no fraud; but not subject to debts at large; and has the same equity to be relieved against a conveyance, as the party had for fraud on him. 2 Vesey, 116.

(D 61.) Derelict lands:—What belong to the king.

So, land, derelict by the sea, belongs to the king by his prerogative; for when the dominion and soil of the British sea belong to him, the derelict land, by consequence, shall be his. Cal. 25.

So, an island which rises in the sea. Cal. 22.

So, where a large tract of land is derelict suddenly; though the lord of the manor claims where there is a gradual accession to land adjacent. 2 Rol. 170. l. 1.

So, the king may grant derelict lands to another.

But, if he grants *omne solum, &c. tali marisco adiacen. modo inundat., quod ad aliquod tempus imposterum recuperat. foret per relictionem maris, vel aliter*, it does not pass lands which afterwards became derelict. R. 2 Lev. 171. Ray 241.

So, if a wharf be erected under low water mark, it belongs to the king. Al. 11.

Or, between high and low water mark. Dub. Al. 11.

(D 62.) What not.

But, if the sea overflows the land of any person, and after forty years flows back again, the owner shall have the land, and not the king. 2 Rol. 168. l. 47.

So, by prescription the lord of a manor, adjacent to the sea, may claim lands derelict by gradual decrease, in respect of his loss when the sea flows upon his land. Cal. 27. 2 Rol. 168. l. 50. 169. l. 40. 50.

So, the soil between the ebbing and flowing of the sea may be parcel of a manor. R. 2 Rol. 170. l. 5.

(D 63.) Possessions of the crown.

All the lands in the kingdom are holden *mediate vel immediate* of the king, though the king holds of no one. Co. L. 1. Vide Tenure (A—B).

So, many lands and tenements are now demesnes in the hands of the king. Mad. 202. Vide Antient Demesne.

Other lands and tenements are demised by the king in fee-farm, which rents belong to the king. Vide Rent, (C 3.)

So, the king may have an inheritance, which he may grant in possession, or reversion; as an office, &c.: or in possession only; as a nomination to a corody, benefice, &c. or which he may grant, or hold in his own occupation; as lands, &c. R. 8. Co. 55.

[The purchaser of a share of a grant from the crown, must either deduce the whole title from the original grantees, or must shew possession under whom he immediately claims. 2 Anst. 615.]

[One seeking to recover in ejectment crown lands, on an adverse possession of 60 years, must have been in possession for that period, either by himself or those under whom he claims. 11 East, 488.]

(D 64.) The

(D 64.) The king seized *jure coronæ*.

All lands and tenements, which the king has, belong to him in right of his crown, and are called *sacra patrimonia*, or *dominica coronæ*. Co. L. 1. b.

Though they were lands and tenements of which he was seized in his private capacity before the descent of the crown to him. Per Holt, Skin. 603. Pl. Com. 213. b.

Or, which descended to him as heir to his mother; as the duchy of Lancaster. Pl. Com. 214.

So, if a statute gives to the king, or vests in him, his heirs and successors, any lands without saying, as parcel of his crown, or to such effect; yet he has them as king *in jure coronæ*. R. Pl. Com. 105. a.

## (D 65.) Lands concealed.

So, if lands belong to the king by attainder, or other title, though they are concealed for a long time, and not in the king's possession, the king may grant them to another; for no time runs against the king.

But nothing shall be said to be concealed land, which comes to the notice of the king by matter of record; as, if land be expressly found by office, to have come to the king; or, be granted or surrendered to the king. R. Cro. El. 508.

## (D 66.) How the king may be entitled.—By matter of record.

In all cases where the king is entitled to an inheritance or freehold, he shall be entitled by matter of record, or by matter in deed found by office upon oath, or by matter in deed without office. 4 Co. 54. b.

If the king be entitled by matter of record, it shall be by conveyance upon record, by judgment, or by office. 4 Co. 54. b.

The king may take by conveyance, by fine, or deed enrolled. 4 Co. 54. b. Godb. 441.

And it is sufficient that the deed be delivered to the officer in court, to be recorded, though it be not enrolled; for the indorsement by the officer, that A. came on such a day, &c. and delivered the deed in court to the use of the king, is sufficient. R. Yel. 30. But where A. leased to the king, and acknowledged it before commissioners, with a prayer that it be enrolled, which is indorsed; if the deed be not enrolled, it is void. R. Lane, 31. 35. 60. Vide Patent, (E).

So, the king cannot take a chattel real, as a lease, &c. but by deed, enrolled upon record. R. Lane, 31. 35. 60.

And the enrolment ought to be in the life of the lessor and lessee. R. Lane, 61.

So, the king will be entitled by a judgment, whereby a man is attainted for treason or felony; for the attainder appears by the record. (4 Co. 57. b.)

But a deed whereby land is conveyed to the king, put into court, without more, is not sufficient. Yel. 30. Cont. Mo. 676. Vide Patent, (E).

So, the king may take by devise, though not of record. Mo. 193.

So, a confirmation by a dean and chapter, to a grant of a bishop to the king, does not need enrolment. Lane, 62.

## (D 67.) By office:—When necessary.

So, in all cases, where a subject shall not have possession, in deed or in

in law, without entry, the king will not be entitled without office found, or other matter of record. *Stamf. Prær. R. 55. b.*

As, if the king's tenant aliens in mortmain, or without licence, the king's title must be found by office. *Stamf. Prær. 55. b.*

If the king claims upon a forfeiture. *Semb. Sav. 1. R. Cro. Car. 173. Jon. 78. 217.*

Or, a condition broken. *Stamf. Prær. 55. b. Sav. 70. 2 Rol. 215. l. 15.*

So, if the king claims the lands of an idiot, lunatic, &c. the person ought to be found an idiot, &c. by office. *Stamf. Prær. 55. b.*

[The court shall not grant a *melius inquirendum*, unless on pregnant matter, that the finding of the former commission was mistaken. *2 Vezey, 555.*]

[The finding on a commission in another county, (especially if corroborated by evidence of witnesses,) is such pregnant matter. *Ibid.*]

So, if he claims the year, day, and waste of a felon attainted. *Stamf. Prær. 55. b.*

If he claims the temporalities of a bishop, for a contempt. *Ibid.*

So, if he claims a freehold or inheritance as forfeited for a contempt. *Sav. 8.*

But where an office does not give a title, but is found for the king's information of his title; after office found, the king shall avoid all mesne acts; for it relates to the commencement of the title in the king. *R. 2 Cro. 82.*

[Notice of issuing a commission for an inquest of office, to inquire whether lands are not escheated, shall not always be given, but on circumstances the court will grant it. *1 Vezey, 269.*]

(D 68.) When it is sufficient, without seizure, or not.

If the king's title be found to lands and tenements, the king shall be in possession immediately by the office, without seizure. *9 Co. 95. b.*

If the possession was vacant. *Stamf. Prær. 54. b. 4 Co. 58. a.*

So, if it be found to a local office, or of which continual profit may be taken. *9 Co. 95. b.*

So, in all cases, where at the time of the office the possession was vacant. *Stamf. Prær. 54. b. 4 Co. 58. a.*

But if the king's title be found by office to an incorporeal inheritance (as an advowson, &c.) the king shall not be in possession before seizure; for if the king, after office, presents, the defendant, in a *quodre impedit*, may traverse the king's title, without traversing the office. *9 Co. 96. a. Stamf. Prær. R. 54. b.*

So, if any other, except him in whose right the king claims, be in possession at the time of the office found, the king shall not be in actual possession till seizure. *Stamf. Prær. 54. b. 4 Co. 58. b.*

[Where the property is forfeited to the crown, the ownership therein is not changed until after seizure, though it may be perhaps before condemnation. *1 T. R. 252.*]

[The stat. 33 Hen. 8. c. 20. which enacts, "that the property of persons attainted shall be adjudged in the actual possession of the crown without office," only dispenses with the necessity of an office; but, as between the crown and the party convicted, a seizure is still requisite

quisite to divest his property; so that if the king pardon him before seizure, it is his own, without words of restitution. 3 T. R. 730. 734.]

[The rights of the crown to property forfeited by attainder, are the same, and no greater than were those of the owner himself when the forfeiture accrued. 2 Taunt. 120.]

[A judicial sale of a vessel found at sea, and brought into port, as derelict, under an order of the instance court of the admiralty, on the part of the salvors and claimant, without fraud, is available against the crown right of seizure, for a previous forfeiture incurred by the ship having been guilty of a forfeitable offence against the revenue laws: although the crown was not a party to the proceeding in the admiralty court, other than by the king's procurator-general claiming the vessel as an admiralty droit, and although no decision of droit or no droit was awarded, and the sale took place *pendente lite*, under an interlocutory order. 3 Price, 97.]

(D 69.) When without a *scire facias*, or not.

So, an office is sufficient for the king, without a *scire facias* against the party, where a common person may enter or seize without an action. 9 Co. 96. b.

As, if a cause of forfeiture of an office be found by office, the king may seize it without a *scire facias*. R. 9 Co. 95, 96.

But where a common person cannot enter, or seize, without having an action, the king after office, ought to have a *scire facias*; as, upon waste, *cessavit*, &c. 9 Co. 96. b. for the office entitles the king to an action only, not to entry. Stamf. Prær. 55. a.

So, if a grantee of the custody of a forest commits a forfeiture, by cutting down wood, &c. which is found by office; there ought to be a *scire facias*, to which the grantee may answer. R. Sav. 1.

So, if the king's title appears by two distinct records, the king shall not be in possession before a *scire facias*, though a common person in such case might enter without action, except in special cases; as if an office finds that the manor of D. is held of the king, and it appears by a fine, that the manor of D. is aliened in *mortmain*, the king ought to have a *scire facias*, before seizure; for it is possible there are two manors of D. 9 Co. 96. a.

So, if the king does not seize within a year and a day, after office found, he ought to have a *scire facias* before seizure. Stamf. Prær. 54. b.

(D 70.) When an office is not necessary.

But if the king's title appears by other matter of record, an office is not necessary. Stamf. Prær. 56. a.

So, if a possession in law be cast upon the king, no office is necessary, but the king may seize without it; as, if the king has a title by descent, in remainder or reverter; for the freehold is cast upon the king by law. Stamf. Prær. R. 54. a. 4 Co. 58.

Or, is entitled by escheat. Stamf. Prær. R. 54. a. R. Sav. 7.

Or, by his seigniorial or prerogative; as by reason of wardship, *primer seisin*, &c. Stamf. Prær. R. 54. a.

So, if entitled to the temporalities of a bishop in the time of vacation. 9 Co. 95. b. Stamf. Prær. 54. a.

So,

So, if an estate granted by the king determines by a condition broken, the king shall be seised, immediately before the breach found by office. 2 Rol. 184. l. 10. Sav. 70. where the breach is apparent upon record. 2 Rol. 215. l. 5. 20.

As, if the king leased upon condition, that if the rent be not paid at the exchequer such a day, it shall be void, &c. The non-payment appears upon record. Dub. 2 Rol. 216. l. 5.

Though the breach be by matter *in pais*; as waste, non-payment of rent, &c. 2 Rol. 184. l. 10. 15.

So, if an estate be granted to A. for life, remainder to the king, upon condition to be void upon tender of money to A.; by a tender, the remainder to the king will be divested without office. R. Mo. 546. Vide post (D 89.)

So, where the king ought to have chattels, or profits of lands for a contempt, he may seize without office; as, upon an outlawry, the goods of a prior alien, &c. R. Sav. 8.

A presentation to a church, upon an avoidance by simony, or otherwise. 2 Vent. 270.

A nomination to an office, void by the st. 5 & 6 Ed. 6. 16. by sale of the office, &c. R. 2 Vent. 270.

So, by the st. 33 H. 8. 20. the king shall be in actual possession of all lands, &c. of any attainted of high treason, without office. Jon. 72.

But though the king be seised for a condition broken, which determines the estate, he cannot grant it to another, till the breach is found by office; as if the king leases, rendering rent, upon condition to be void for non-payment, he shall not lease to another till office found, that the rent was not paid. R. Sav. 70.

(D 71.) Intrusion upon the king:—What shall be.

If the king be seised of lands or tenements by matter of record, he cannot be disseised or ejected; but if any one enters, he will be an intruder upon the king's possession. Stamf. Prær. R. 56. b.

And therefore, if a man enters upon the king's demesnes, and takes the profits, it will be intrusion; for, as the king takes only by matter of record, he cannot be ousted of his possession, but by matter of record. Co. Lit. 277. a.

So, if he enters upon a possession cast upon the king by descent, escheat, &c. before entry by the king. R. Sav. 7. 4 Co. 58.

So, if an heir, in ward of the king, enters after his full age, before livery. R. 2 And. 210.

Or, if the heir of the king's tenant enters, after finding for the king, before livery. Sav. 55.

So, if a man enters upon a farmer or committee of the king, it will be intrusion, and does not oust the king. Stamf. Prær. R. 56. b. Fitz. Prær. 12.

So, if the king's tenant holds over his term. Hard. 25. 2 Rol. 215. l. 10. Vide Estates, (I 2.)

So, if a man ousts a lessee for years of the king, an information of intrusion lies; for a lessor shall have an assise, if his lessee for years be ousted. Sav. 69.

An intruder upon the king does not gain any freehold in the land. Fitz. Prær. 12.

By

By the stat. Prær. R. 13. *si hæres ingrediat, (viz. after office found upon the death of his ancestor tenant in capite,) nullum accrescit ei liberum tenementum; et si obierit, &c. Uxor ejus non habebit dotem, eo quod vir suus intravit per intrusionem, &c.* Stamf. Prær. 40.

And therefore, where any intrudes or enters upon the king's possession the king shall not be put to assise or ejectment. Stamf. Prær. 56. b.

So, if he enters upon the king's committee or farmer. Stamf. Prær. 56. b. Vide supra et infra.

So, an intruder cannot make a lease to maintain an ejectment. Al. 11. Vide infra.

Neither can he maintain trespass, though he be possessed several years; for the trespasser shall answer to the king for his wrong, and he shall not be punished twice. Pl. Com. 545. b. Cont. All. 11. Per three J. acc. others cont. Godb. 133.

So, he cannot make a feoffment. R. 2 And. 210. Sav. 32, 55.

So, a fine by him will be void. 2 And. 210. Sav. 55.

But if the heir of tenant *in capite* enters before office found, he has seisin. Stamf. Prær. 40. b. Sav. 55.

So, if a stranger enters by title, or without title, upon land in ward of the king, before office found for the king. Stamf. Prær. 57. a.

So, if tenant in tail, remainder to A. in tail, remainder to the right heirs of tenant in tail, makes a feoffment, it will be a discontinuance; though as to the reversion he had not paid *primer seisin* to the king. R. 2 And. 210.

So, if tenant in tail, remainder for years to A., remainder to tenant in tail in fee, and A. assigns to the king, and then tenant in tail makes a feoffment, it will be a discontinuance. 2 And. 210.

So, an heir may make a lease, bargain, and sale, &c. which enure as a contract. Sav. 55.

So, if A. enters upon the king's farmer, and leases to B., he shall maintain an ejectment; for A. gained the estate of the farmer. R. 3 Leo. 206. Vide supra.

(D 72.) How he shall be redressed:—By information of intrusion.

If a man intrudes upon the king's lands, an information for the intrusion lies in the name of the attorney-general. Pl. Com. 547. 1 Co. 16. b. Co. Entr. 372. 376. F. N. B. 90. I.

And it is sufficient, though it be general, that the king was seised of certain lands, without describing the particular species, or quantity; for it is in the nature of a trespass, *quare clausum fregit*. Sav. 48.

If an intruder cuts the trees, or takes the goods of the king, an information lies also against his executor. R. Sav. 40.

So, the king may have trespass, *quare clausum fregit, herb. depast. fuit arbores succidit, &c.* F. N. B. 90. I.

(D 73.) What process upon it.

The process upon an information shall be a *venire distringas*, and afterwards a writ out of chancery, directed to the treasurer and barons, 4 Inst. 110. Q. Whether this extends to process upon an information? Vide Information, (D 1.)

But

But by the st. 21 Jac. 14. if an information of intrusion lies, a *scire facias* shall not be brought to put the defendant to plead specially.

(D 74.) Plea to such an information.

At common law, upon an information of intrusion, the king, by his prerogative, might put the defendant upon shewing his title specially. Dy. 238. b. Vide post, (D 85.)

And if he pleaded not guilty, he should be immediately put out of his possession; for a title for the king appears upon the information; if no title appears upon record for the defendant. 4 Inst. 116. D. Parker, 2.

And if the defendant shews an insufficient title in form, the attorney-general may demur. Dy. 238. b.

A plea of a special title in the defendant concludes with a traverse of the intrusion. Pl. Com. 548.

But the defendant might plead *non intrusit*, generally. Semb. Sav. 4. Or, not guilty. Sav. 66.

And by the st. 21 Jac. 14. if the king, or those claiming under him, or those under whose title the king claims, have not been in possession, or received the profits within twenty years, the defendant may plead the general issue, and shall not be ousted of his possession, till the title be found or adjudged for the king.

So, if he pleads so much as shews that the defendant has title to the possession, it is sufficient; for an information of intrusion is in the nature of trespass; as if the defendant, by her plea, shews that she has a jointure of a third part, without answering to the residue; for by that she has the possession of the whole in common with the king. Semb. Mo. 370. 376.

So, a *terre-tenant* may plead payment, or matter which goes in discharge of the land, without shewing a title. Hard. 230.

If in an information for intrusion the defendant pleads his title, he ought to shew a good title. Mo. 385.

And therefore, if intrusion be alleged in M. Marsh, it is not sufficient to shew a grant by patent of S. Marsh, without an averment *quæ est eadem*. Sav. 48.

And if he pleads such grant, and concludes with a traverse, *absque hoc* that he is guilty of the land in the information, it is bad. R. Sav. 34.

If he pleads that A. was seised, and died seised, and the land descended to the defendant; for a descent does not bind the king. R. Sav. 45.

If he pleads that an abbot and convent, seised in fee, leased for years to A., which estate the defendant has; for he cannot make title to a term by a *que estate*. Semb. Dy. 238. b.

But if the title shewn by the defendant be defective in form, and the attorney-general does not demur, but joins issue upon a fact alleged, which is found against him, he shall not afterwards take advantage of the defect. Dy. 238. b.

[Defendant cannot plead several matters by 4 Ann. c. 16. for amendment of the law. Parker, 1.]

(D 75.) Replication.

If the plea alleges several facts, the king, by his prerogative, may traverse them all, though a common person ought to traverse but one. Sav. 19.

If the plea alleges a title, which avoids the possession in the king supposed by the information, the king need not maintain the information, but may traverse the title alleged by the plea. R. Sav. 61. Vide post, (D 85.)

But it is sufficient, if the king, by his replication, traverses so much of the title as encounters the information, without answering to the whole title alleged by the defendant; as, if an information be for intrusion in the moiety of a manor, the defendant says, A. was seised of the whole, and died seised, by which there was a descent to the defendant; it is sufficient to traverse, *absque hoc* that he died seised of such moiety. R. Sav. 61.

(D 76.) Verdict.

If intrusion be alleged in twenty acres, and the verdict finds the defendant guilty only in twelve acres, and in the residue not guilty, judgment shall be for so much, and he who pursues for the king shall take possession at his peril. R. Sav. 28.

If a declaration be for intrusion in twenty acres in A. and twenty acres in B., and the defendant is found guilty of ten acres, without saying in which vill, yet it shall be good. Dub. Sav. 35.

If there be a verdict for the king, judgment shall be for the king, though the defendant dies. Sav. 57.

(D 77.) Judgment and execution.

The judgment in an information for intrusion for the king shall be, that the defendant *amoveatur de possessione*. Sav. 35. The judgment shall be, *quod capiatur pro fine*, and thereupon there shall be an injunction for the possession; for the king is supposed in possession. R. Hard. 460. 462.

If the information charges intrusion, and that he cut trees, &c. the judgment shall be also for damages. Q. Sav. 49.

After judgment, execution shall be sometimes by injunction. Sav. 35. Hard. 460.

Or, by *amoveas manum*. Sav. 35. Hard. 462.

And thereupon every party to the information, or claiming under him, shall be removed from the possession. Hard. 460. 462.

But a stranger to the information shall not be debarred of his entry; for on an information no judgment of seisin is given, nor does an *habere facias seisinam* go. R. Hard. 460. 462.

(D 78.) Remedy against the king:—By petition.

The king cannot be sued by writ, for he cannot command himself. 4 Co. 55. a. Vide Action, (C 1.)

And therefore, where the king is seised by matter of record, or by matter of fact found by office upon record, he who has right shall be, by the common law, put to his petition of right, in the nature of a real action, to be restored to his inheritance, or freehold. R. 4 Co. 55. a. R., per all the J. 4 H. 7. 7. b.

So, in all cases where the king seises the lands or goods of a subject, without due order of law. Stamf. Prær. 72. b.

So, if the king enters into the land of another, without title or office found. Stamf. Prær. 74. a. b.

Or,

Or, does not pay an annuity granted by him, or issuing out of land in his hands. *Ld. Somers's Arg.* 81.

Or, does not pay a debt, wages, &c. *Ld. Somers's Arg.* 85.

And in all cases where a traverse, or *monstrance de droit*, does not lie, suit ought to be to the king by petition; as, if the king be entitled by double matter of record. *Stamf. Præer.* 74. a. *R.* 3 *Leo.* 15. Both records being removed into the same court. *Lane,* 58.

If the king be entitled by a record not traversable; as, by a recovery in the king's court, by assent without title. *Stamf. Præer.* 74. a.

By an erroneous judgment; for error shall not be allowed, without a petition. *Stamf. Præer.* 74. a.

If a stranger brings a *præcipe in capite*, against the tenant of B., and recovers by default, though B. is not thereby out of possession of his seignior, yet if the recoveror dies, his heir within age, and the king seizes the ward; B. ought to sue for the ward by petition. *Ibid.*

So, in all cases where a man has a right, and in the case of a common person, his entry would be tolled, he ought to sue to the king by petition; as, if A. disseises B. and dies seised without claim made, and then it is found by office that A. held of the king *in capite*; B. has not any remedy but by petition. *Stamf. Præer.* 74. b.

So, in all cases where the entry would be tolled, if the land was in the hand of a common person. *Ibid.*

Or where the party controverts the king's title. *Per Holt, Skin.* 608.

But where the king seizes lands, or enters without title or matter of record, if he who has right be permitted to enter, his entry is not unlawful, nor shall it be an intrusion upon the king. *Ibid.*

So, if the king in such case grants to another, he may enter upon the patentee without petition. *Ibid.*

So, though an office finds a title in the king, and a grant, if it appears by the same office that the fact is mistaken. *R. Dy.* 101. a.

So, where an estate is forfeited by attainder, &c. none can sue by petition before office found; for till office the estate is not vested in the king. *Jon.* 78.

If A. be attainted in B. R., and it be found by inquisition in the exchequer that he was seised of the manor of D., this will not be double matter of record, the attainder not being in this court, to entitle the king, that a suit by the owner ought to be by petition. *R. Lane,* 58.

#### (D 79.) To whom the petition shall be.

Suit shall be to the king by petition, for goods as well as for lands. *Stamf. Præer.* 72. b. 75. b.

So, it shall be for land, where the king is seised *en autre droit*. *Stamf. Præer.* 75. b.

But suit by petition shall not be to any other but the king. *Ibid.*

Not to the queen; for she has no such prerogative. *Ibid.*

Nor, to the prince. *Ibid.*

#### (D 80.) How the proceeding upon it shall be.

A suit by petition may be to the king in parliament, or in chancery, or other court.

If it be in parliament, it may be established by act of parliament, or pursued as in other cases. Stamf. Prær. 72. b.

Upon petition out of parliament, or there (if it be not pursued as a statute) it shall be indorsed by the king *soit droit fait*, and then delivered to the chancellor. Stamf. Prær. 73. a. Mo. 639.

Or, a petition may have a special conclusion, that the king command his justices of B. R. or C. B. And if it be indorsed accordingly, it shall be pursued there. Stamf. Prær. 73. a.

If a petition be delivered to the chancellor, there ought to be an inquisition which finds the right of the party, before the petition be depending, or there be any proceeding upon it. Stamf. Prær. 72. b. Except where the attorney-general confesses the suggestion. Skin. 608. Ld. Somers's Arg. 41.

If the inquest finds for the king, there ought to be another inquisition till a title be found for the party. Stamf. Prær. 73. a.

If a petition be indorsed to B. R. or C. B., it may be proceeded upon without an inquisition; for the indorsement warrants it. Stamf. Prær. 73. b.

So, where no office is found to entitle the king, the party may pursue a petition, without an inquisition for him. R. Mo. 639.

After a commission, whereon a title is found for the party, before he can interplead with the king, there ought to be a writ to enquire of the king's title. Stamf. Prær. 73. b.

And this, in all cases where a petition was in parliament, or elsewhere, where land was in the king's hand, or granted to another; for after issue found, upon petition, for the party, the king shall be concluded for ever. Ibid.

If the land be granted to another, there shall be a *scire facias* also against the patentee. Ibid.

So, where a petition disaffirms the king's possession, there ought to be four writs of search to the treasurer and chamberlains of the exchequer. Mo. 639.

But writs of search are not necessary, where the petition affirms the king's possession; as, upon a petition of right of dower. R. Mo. 639.

(D 81.) By *monstrance de droit*. When it lies by the common law.

By the common law, a man might sue to the king by *monstrance de droit*, if his title had appeared by the same record by which the king was entitled; as, if the king was entitled by an alienation in *mortmain*, purchase from his villein, from an *alienee*, escheat, and the same office which found for the king, found also the title or interest of the party. R. 4 Co. 55. a. Per Holt, Skin. 609.

So, if his title appear by another record of as high a nature; as, if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognizance given, or other matter performed, which must be upon record; if he who made the conveyance levied the fine, gave the recognizance, &c. he may have a *monstrance de droit* by the common law; for the performance appears by the record as high as the conveyance. 4 Co. 55. b. R. 4 H. 7. 7. b.

So, though the performance of the condition be not upon record, if it be afterwards found by office. 4 Co. 55. b.

So,

So, if the title of the party be not found by the same or another record, whereupon he sues to the king by petition, and an inquisition be granted upon the petition, finding his right; he afterwards may have a *monstrance de droit* by the common law. 4 Co. 57. b.

But, if the title of the party does not appear by the record, which finds a title in the king, nor by any other record as high, he cannot have a *monstrance de droit* by the common law, but ought to sue to the king by petition. 4 Co. 55. b. Lord Somers's Arg. 75.

Though it appears by the return of the sheriff, mayor, &c. to a *diem clausit extremum*, or other writ; for the return, though filed upon record, is not so high as an office found *per sacramenta proborum hominum*. 4 Co. 55. b.

So, if the title of the party is found by a ministerial record, as an inquest before an escheator, &c. when the king's title appears by a judicial record, as an attainder, judgment, &c. which is higher. 4 Co. 56. a.

(D 82.) When, by statute.

So, now by the st. 36 Ed. 3. 13. lands being seised by inquest of office before the escheator, any who will claim the lands seised shall be heard to traverse the office, or otherwise shall have a *monstrance de droit*.

And therefore, when an office is found, which is traversable by that statute, the party may have a *monstrance de droit*. 4 Co. 59. a.

Though he be not put out of possession by the office. Ibid.

Though the king be entitled by matter *in pais*, found by record; as, by purchase of his villein, alienation in *mortmain*, &c. Ibid.

So, if the king be entitled by office, or matter of record, which is traversable, but, being true, cannot be traversed, the party may have a *monstrance de droit*. Stamf. Prær. 71.

As, if it be found that the king's tenant died seised, and the land descended to his heir; where A. recovered against him before his death, but he died before execution. Stamf. Prær. 71. a.

Or, the tenant disseised me. Stamf. Prær. 71. a. 4 Co. 54. b.

But, where the king was entitled by double matter of record, the party could not have a *monstrance de droit*, till it was given by the st. 2 & 3 Ed. 6. 8. Stamf. Prær. 71. b. Or the title of the party be found by one of the records, or he pleads to one, *nul tiel record*. Stamf. Prær. 72. a.

In all cases where the party may have a traverse, or *monstrance de droit*, he may enter, or have an action, if the king grants over the land. 4 Co. 59. b.

A *monstrance de droit* lies only in chancery, or the exchequer, except in special cases. Per Holt, Skin, 609.

The *monstrance de droit* recites the inquisition found for the king, and then shews the right of the party, and prays an *amoveas manum*. Co. Ent. 402.

If the attorney-general confesses the title of the party, judgment shall be, *quod manus Domini regis amoveantur*. 4 Co. 57. b.

If he replies to the title of the party, and afterwards confesses it. Co. Ent. 404. b.

Or, if found for the party by verdict, or upon demurrer. 4 Co. 57. b. Co. Ent. 406. b.

So, there shall be judgment also for the *mesne* issues and profits. Stamf. Prær. 71. a.

If the plaintiff, in a *monstrance de droit*, has no title, he shall be nonsuited. Sal. 448.

And he cannot have judgment, though the king has no title, if he himself has no right. Ibid.

If there be a *monstrance de droit*, upon an inquisition in chancery, and upon that the attorney-general demurs there, it shall be delivered into B. R. by the hands of the chancellor, and there determined. Sal. 448.

But if the right of the plaintiff in a *monstrance de droit* appears, or may be collected by the inquisition, or the inquisition be falsified by it, judgment shall be for the plaintiff, and the inquisition, as to him, shall be avoided. R. Sal. 448.

(D 83.) Traverse of office — : When it lies by the common law.

By the common law, where the king was entitled by office, though it was false, the party could not have a traverse to the office. 4 Co. 56. a.

Nor, could avoid it without petition. Stamf. Prær. 60. b. 13 Ed. 4. 8. a. Lord Somers's Arg. 77.

Nor, where the king was entitled by any matter of record, judicial or ministerial, conveyance of record, or matter of fact found by office of record. R. 4 Co. 55. a.

Though the office concerned only a chattel real. 4 Co. 56. a. Vide *infra*.

But, where the office did not give a seisin or possession to the king, but only entitled him to an action for recovery of the land; in such action the party might traverse the office by the common law. 4 Co. 56. b.

As, if an office finds that the king's tenant has ceased for two years, or done waste, or made a feoffment by collusion, &c. whereby the king is entitled only to his action of *scire facias* against his tenant, in which the tenant may traverse the *cesser*, waste, collusion, &c. Ibid.

So, by the common law, an office, or inquisition for goods or chattels personal might be traversed. Stamf. Prær. 60. a. 13 Ed. 4. 8. a. Vide *supra*.

As, if A. be attainted for treason, or felony, or outlawed in debt, trespass, &c. and an inquisition finds that he had such goods at the time of the felony or outlawry; a stranger, who has the property, may traverse it. R. 4 Ed. 4. 24. a.

[If a term for years is found and sold on an inquisition on an outlawry, a mortgagee, not in possession, shall be allowed to plead to the inquisition. Semb. Bunb. 104.]

[On outlawry, inquisition thereon returned, *levari* issued, and money levied, he who has a statute-merchant, and is in possession of the land, may, on motion, have time to plead to outlawry and inquisition; and, on giving security, have the money in the sheriff's hands repaid him. Bunb. 123.]

[If,

[If, on inquisition, a man is found possessed of a term in right of his wife, and after his death it is sold on *venditioni exponas*, the widow shall be permitted to plead to the inquisition, though she has defended an ejectment brought by the purchaser, and filed a bill in chancery. *Watts v. Robinson*.]

So, offices for information only are traversable; as all offices under the exchequer seal. Sav. 130.

But, where by office or statute without office, a particular estate is vested in the king, he, in the reversion or remainder dependant upon the estate vested, may enter upon the king, (his estate being determined,) without traverse, or *amoveas manum*. R. Sal. 469.

So, if it be found by inquisition, that A., outlawed in a personal action, was seised of lands, which B. claims, and the escheator takes the profits by this false office: B. may disturb him, without a traverse. *Stamf. Prær.* 67.

[When an inquisition is traversed, security is taken to the value of two years' profits of the lands. *Bunb.* 25.]

#### (D 84.) When, by statute.

And now by the st. 34 Ed. 3. 14. where lands are seised upon an office of the escheator, finding that the king's tenant alienated without leave, or held by knight's service, and died, his heir within age, he shall be received to traverse in chancery, that the land was not seisable.

But this statute extends only to offices found *virtute brevis aut commissionis*, not *virtute officii*. *Stamf. Prær.* 60. a. 4 Co. 57. a.

And if the traverse is found for the party, he shall not have judgment till a writ of *procedendo ad judicium* be awarded. *Ibid.*

By the st. 36 Ed. 3. 13. if land be seised by an office before the escheator returned into chancery, a man, who challenges the lands seised, shall be heard without delay to traverse the office, &c. and thereupon there shall be a final discussion, without waiting for any other commandment.

And the last statute allows a traverse to all offices found before the escheator. *Stamf. Prær.* 61. a. 4 Co. 57. b.

And to offices found before commissioners, as well as before the escheator. *Stamf. Prær.* 61.

And by the st. 8 H. 6. 16. it is extended to all aggrieved by the inquest, though not put out of possession by the escheator.

And therefore, in all cases, where the king is entitled by office, the party grieved may traverse the point, by which the king is entitled; as, if an office finds a tenure *in capite*, the tenant may traverse the tenure. *Stamf. Prær.* 62. a.

So, he who has title, if he shows his title, may traverse before his title be found by record. *Stamf. Prær.* 63. b.

So, by the st. 2 & 3 Ed. 6. 8. if any be untruly found heir, lunatic, idiot, or dead, the party grieved may traverse the office or inquisition.

Or, any be entitled to an estate of freehold in lands, found by office or inquisition to belong to a person attainted of treason, felony, or *præmunire*; though the king be entitled by double matter of record.

But those statutes do not allow a traverse, except where the king is entitled by the office; as, if A. be attainted for high treason by verdict or act of parliament, &c. and it is found by office, that, at the time of the treason, he was seized of such lands, which B. claims as his own; B. cannot traverse the office, without saying, that there is no such record of attainder. R. 4 Ed. 4. 21. 29. a. Stamf. Prær. 61. b. But this was remedied by the st. 2 & 3 Ed. 6. 8.

So, a man shall not be allowed to traverse the office where he cannot be aided by an office to the contrary; as, if an office finds a tenure from the king, and that the tenant is dead, and A. is his heir; A. shall not traverse the office, that he is not heir, if the tenure be true; for if another office should find him not heir, it does not avail; for the better office shall be taken for the king. Stamf. Prær. 61. b.

So, if the tenant dies seized of lands in divers counties, and A. be found his heir of full age, by office in one county, and within age, by office in another county; he cannot traverse that he is not within age. Stamf. Prær. 62. a.

So, none, who has not title, can traverse an office which finds a title in the king; as, if an office finds a tenure *in capite*, and that the heir is within age; the lord, who claims a tenure in socage, shall not traverse the tenure *in capite*; for he has no title to the wardship. Stamf. Prær. 63. a.

Nor, a feoffee, without making to himself a title by feoffment, licence, alienation, &c. Ibid.

And it is not sufficient to shew a title by estoppel; as, a fine, &c.; for the king shall not be estopped. Stamf. Prær. 64. a.

So, it is not sufficient, if he does not traverse all titles, which the king had at the time of the traverse. Stamf. Prær. 64. b.

So, a termor for years cannot traverse an office, which finds the inheritance or freehold in the king. Stamf. Prær. 62. b. Semb. cont. 4 Co. 58. a.

But now by the st. 2 & 3 Ed. 6. 8. a lessee, copyholder, or any who has a rent, or other profit *apprendre* out of lands. &c. in an inquisition, where the king is entitled, shall hold and enjoy his term or interest, as if no inquisition had been found, or his lease or interest had been found by such office.

And it is sufficient for the lessee, &c. to show his interest, &c. without alledging seisin in another under whom he claims; for the title to the inheritance is not traversable, where the lessee, &c. only supplies the defect of the office or inquisition.

[To an inquisition on an extent on an outlawry, the defendant, as terre-tenant, may plead that the party outlawed is dead, without setting forth a special title. Bunb. 102.]

[A writ of *diem clausit extremum* shall not be set aside on motion, for defendant may plead to the inquisition. Bunb. 118.]

[The traversor of an inquisition of lunacy found for the king, shall be considered as a defendant, and therefore the record shall be made up, and carried down to trial by the prosecutor. Str. 1208.]

Yet, the heir, &c. shall not traverse the office, without an office which finds him heir. R. 7 Co. 45. 2 Cro. 186. Vide ante, (D 82.)

(D 85.)

(D 85.) Remedy for the king : — What privileges the king shall have in suits.

The king, by his prerogative, may sue in what court he pleases. Sav. 9, 10. F. N. B. 7. B. 32. E.

[When the revenue is concerned in the event of a cause, it shall be removed from any other court where action brought, into the office of pleas in Scac. Parker, 143.]

[But the crown has not an election to proceed against its debtor, either by extent or *scire facias*, where the debtor is not insolvent. 3 Price, 288.]

If the defendant dies, the action by the king does not abate. 2 Cro. 481.

So, the king may lay his action in what county he pleases, in any personal action. 1 Vent. 17. 1 Sid. 412. Vide Dett, (G 12.)

So, for lands in any county, he may lay his action in the exchequer, and try it in that court. Sav. 10.

So, he may have a bill for taking of goods in Middlesex, and intruding into lands in the county of N.; for, upon not guilty, a *venire facias* goes to each county. R. 4 Leo. 26.

[Information in Scac. for loading woollen yarn for exportation, may be laid in any county; the offence is transitory, and there are no negative words in the statute (12 C. 2. c. 32.) Bunb. 236. Parker, 182.]

[If on a commission to inquire whether A. is an alien, it is found against the king, he cannot have another new commission into the same county, but he may have a *melius inquirendum*; and if that also is found against the king, it is conclusive; if for him, A. may traverse, 2 Vesey, 438.]

So, the king may amend his declaration in the same term. Vau. 65. But not in another term. R. 13 Ed. 4. 8. a.

So, in an information of intrusion, if the defendant makes a special title, he ought not to traverse the intrusion, but the matter, upon which by the information he is supposed to be an intruder. Per Manwood, Ch. Bar. Shute cont. Sav. 2. Vide ante, (D 74.)

In an information in the exchequer (if the king appears entitled by matter of record, Vau. 64.) if the defendant pleads in the bar, and traverses the matter of the information, the king need not maintain his information, but may traverse the matter alleged by the plea. 2 Cro. 481. Sav. 64.

So, in a traverse of an office which finds a title to the king, the king may traverse the title of the party, or maintain the office at his election. Stamf. Prær. 65. a. Vau. 64.

So, if the king has several titles traversed, he may maintain all, or only one at his election. Stamf. Prær. 65. a.

So, the king may waive his replication in another term, when the defendant is ready to rejoin. R. 2 Rol. 41.

So, in an information the king may waive his demurrer to the defendant's plea, and reply to issue. Cro. Car. 347. Vau. 65. Hard. 455. Pl. Com. 322. a.

[If defendant pleads, and attorney-general does not reply or demur in

in reasonable time, the court may give judgment for defendant as if plea confessed; but attorney-general should first be attended. Parker 50.]

And the defendant cannot waive his plea, and plead the general issue, without the consent of the attorney-general. Cro. Car. 347. 2 Rol. 41.

[If on a *scire facias* out of the petty bag to repeal letters patent, one defendant has pleaded to issue, and as to the other demurrer was joined, the king may bring on either the trial or the demurrer first, as he pleases. Str. 266.]

So, after issue joined, the king may waive the issue, and demur. Stamf. Prær. 65. b. In the same term. Vau. 65. Hard. 455. Pl. Com. 322. a.

Or, take another issue in the same term, though not in another term. Stamf. Prær. 65. b. Vau. 65. 13 Ed. 4. 8. a.

But, if the king joins issue upon a traverse of his title, he cannot afterwards waive it, to traverse the title of the defendant. Semb. Vau. 64. 1 Mod. 276. R. 13 Ed. 4. 8. a.

So, in the exchequer, no *nisi prius* shall be granted where the king is a party, where the attorney-general does not consent. Sav. 2.

So, the trial shall be at *nisi prius*, and not in bank, if the king by letter requires it. Cro. Car. 349.

Though it be upon an indictment removed by *certiorari*. Cro. Car. 348.

So, the king shall take advantage of an estoppel, though no party to the record; for he is always present. Vide Estoppel, (D).

So, if a title appears upon record for the king, the court *ex officio* shall judge it for him. Cro. Car. 590.

So, if the attorney-general confesses the plea of the party, and thereupon he be discharged, where the plea is no bar in law, the king shall not be bound; for though a confession by the attorney-general in a matter of fact binds the king, it is not so in a matter of law. Semb. Hard. 170.

But after a *distringas*, and jury returned upon it, the attorney-general cannot at his pleasure stay trial. Qu. 4 Leo. 32.

Neither can he waive the issue after verdict. Hard. 455.

[Prisoner at the king's suit, brought up by *habeas corpus*, cannot be committed to the Fleet without consent of the crown, because the king may choose to commit him to what prison he pleases. Barnes, 385. 388.]

(D 86.) No time runs against the king.

So, the king shall not be prejudiced by his neglect to pursue his right.

So, where the king is patron of a church, a lapse does not incur for not presenting within six months. Vide Eglise, (H. 6. 9. 11, 12.)

So, if the king's goods are wrecked, the lord shall not have them for the king's not proving his property within a year and a day; for he may do it at any time. 2 Inst. 168.

If the king's debt be not recovered before another takes execution, the king shall not be prejudiced; for *nullo tempore occurrit regi*. Hard. 25. Vide Dett, (G 8.)

By

By M. Ch. 9. H. 3. 29. *nullus liber homo capiatur, imprisonetur, dis-  
solvatur de libero tenemento, libertatibus, liberis consuetudinibus suis, utla-  
getur, exuletur, aut aliquo modo destruat, nec super eum ibimus, aut  
mittemus nisi per iudicium parium suorum, vel per legem terræ.*

*Nulli vendemus, nulli negabimus, aut differemus justitiam, aut rectum.*

And therefore the lands or goods of none shall be seised by the king,  
except by course of law. 2 Inst. 46.

[By stat. 9 G. c. 3. 16. the king shall not sue, &c. any person, &c.  
for any lands, &c. (except liberties and franchises,) on any title which  
has not first accrued within sixty years before the commencement of  
such suit, unless he has been answered the rents within that time, or  
they have been in charge, or stood *insuper* of record, and the sub-  
ject shall quietly enjoy against the king, and all claiming under him  
by patent, &c.]

[This extends not to estates in reversion or remainder, or limited  
estates.]

[These lands shall be held on the usual tenures, &c.]

[Usual fee-farm rents confirmed.]

[Putting in charge, standing *insuper*, &c. good only when on ver-  
dict, demurrer, or hearing, the lands, &c. have been given, adjudged,  
or decreed to the king.]

(D 87.) The revenue of the king; how disposed: — The  
personal revenue.

No officer, nor all together, can dispose of the king's treasure *ex  
officio*. 2 Rol. (180.) l. 35. 11 Co. 91. b. Lord Somers's Arg. 57.

Though it be for the honour or profit of the king. 2 Rol. (180.)  
l. 35.

So, the court, or barons of the exchequer, cannot dispose of the  
king's treasure out of his exchequer to a grantee of the king by any  
judgment upon the exhibiting of a patent to them. R. per Treby and  
Lord Chancellor Somers, 5 Mod. 46. 62. Cont. per Holt and other  
J. Skin. 611. Lord Somers's Arg. 128.

So, no treasure can be disposed of, but by the great or privy seal.  
Lord Somers's Arg. 56.

Not by warrant of the treasurer and under-treasurer. 11 Co. 91.  
Lord Somers's Arg. 58.

So, every one who receives money issuing out of the exchequer,  
without due warrant, is accountable for it. Mad. 271. Vide Dett,  
(G 1.)

But, by the writ or warrant of the king, or the barons of the ex-  
chequer, to a sheriff, &c. such payment may be directed out of the  
money in his hands, which, upon producing such warrant, shall be  
allowed upon his account. Mad. 248.

And upon such warrant the settled alms and liveries were usually  
paid. Mad. 248.

And frequently sums for the service or debts of the king. Mad. 250.

So, upon a bill of such expence made, &c. the chancellor issues a  
writ of *allocate*. Mad. 271.

So, the king issued sometimes by way of prest, or imprest, out of  
the receipt of his exchequer, &c. money for such a service; for which  
the receiver became accountable to the king. Mad. 266.

And

And such imprest was upon a writ or mandate of the king, under the great or privy seal, directed to the chief justice and barons, or to the treasurer and chamberlains, and founded upon a bill or certificate of the exchequer, or other matter of record. Mad. 268. (Reg. 192, 193.)

Or, by a *liberate* directed to the treasurer and chamberlains, commanding them *liberare de thesauro nostro* such a sum. Mad. 268. (Reg. 192, 193.)

And such *liberate* was *pro hac vice*, or for a payment *annuatim*, which is called a dormant or current *liberate*. Ibid.

#### (D 88.) The lands and real revenue.

The king may dispose of his lands and other real revenue of inheritance, by his patent, to others, when he pleases. Pl. Com. 213. b.

And not only lands which he has by descent or purchase, but also, which are settled upon him, his heirs and successors, by parliament. R. 5 Mod. 47. 55. Skin. 602. 605.

So, the customs, excise, &c. given to him and his heirs. 5 Mod. 56. Skin. 602.

So, the king may mortgage his lands.

And the mortgagee ought to demand the money at the day, at the receipt of the exchequer; otherwise the king may re-enter. R. Mo. 556, 557.

So, the king may grant a rent-charge, or annual sum, to be paid out of his possessions or revenue. Per Holt, Skin. 607.

And if he grants an annuity, or annual payment of a sum, it does not charge his person, but his possessions. Skin. 607.

And such annuity or rent-charge is assignable to another, in part or in the whole. Ibid.

So, the king may convey lands of which he is seised in right of the duchy of Lancaster, by feoffment, and there ought to be livery by attorney. R. 1 Lev. 29. Not when united to the crown. Pl. Com. 214. a.

But by the st. 1 Ann. 7. s. 5. all grants, &c. by the queen or her successors, after the 25th of March 1702, of any manors, lands, &c. (advowsons of churches, and vicarages excepted,) shall be void, except made for a term of thirty-one years or under, or for three lives, or for a term determinable on one, two, or three lives, or in reversion, making up the term of thirty-one years, or three lives, &c. to commence from the date or making, subject to waste, and reserving the usual rent or more; or, if no rent before, reserving a rent not less than a third part of the clear yearly value, payable to the queen and her successors during the whole term.

Provided building leases may be for fifty years, or three lives, &c.

And the hereditary excise, revenue, of the post-office, first-fruits and tenths, fines for writs of covenant and entry at alienation office, post-fines, wine-licences, sheriffs' profers and compositions, and seizures for uncustomed and prohibited goods, shall not be alienable, but for the life of the king, who grants them.

[Stat. 17 G. 3. c. 17. directs Enfield Chate to be divided and inclosed.]

[N. B. It is surmised this act will lead the way to the improvement of

of other of the king's lands, now yielding little profit, and that it was promoted by the earl of Clarendon, chancellor of the duchy, with that view.]

[See as to the sale of the land revenues of the crown, 26 G. 3. c. 87. 30 G. 3. c. 50. 34 G. 3. c. 75. 48 G. 3. c. 73. 52 G. 3. c. 161. 53 G. 3. c. 121. 54 G. 3. c. 70. 55 G. 3. c. 55. 56 G. 3. c. 128. 57 G. 3. c. 97.]

(D 89.) When lands shall be divested out of the king :—  
By office.

As the king takes by matter of record, so, generally, his estate shall not be divested, without office or other matter of record.

As, if land be given to the king by deed enrolled, upon a condition ; the grantor cannot enter for the condition broken, without office.

But where the king's estate depends upon the estate of another, if the former be defeated, the remainder to the king shall be divested, without office ; as, if land be granted to A. for life, with power of revocation, remainder to the king ; if the uses are revoked, the king's remainder is divested without more. R. 2 Rol. 215. l. 45.

So, if an estate be demised to A. for life, remainder to the king, upon condition, that if the lessor pays to A. 10*l.* he shall re-enter ; if he pays he may re-enter, and divest the remainder in the king without office. R. 2 Rol. 215. l. 35. Mo. 546.

(D 90.) By judgment : — *Ouster les mains.*

If upon a petition, *monstrance de droit*, or traverse, the plaintiff recovers, judgment shall be given *quod manus domini regis amoveantur* ; and thereupon a writ of *ouster les mains* goes, which is to the effect, that the plaintiff shall have his lands, seised by the king, out of the king's hands. Stamf. Prær. 77. b.

Vide ante, (D 82.)

*Prerogative Court.* Vide COURTS, (N 2.)

## PRÆSCRIPTION.

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**(G) How a prescription shall be destroyed. p. 100.****(H) How pleaded. p. 100.****(A) Who may make it.**

[All prescriptions must have a legal origin; but customs need not. 6 Co. 59. Hob. 86. 1 Vent. 383. 386. 11 Mod. 148. 161. Doug. 126.]

A prescription, regularly, ought to be, by a man, in him and his ancestors, or in him and those *quorum statum ille habet*, or by a corporation, in them and their predecessors. Co. L. 113. b. Vide post, (H.)

Yet an officer may prescribe in him and all those *quorum statum habet*. Kit. 106.

So, the chancellor may prescribe, that he and all chancellors, &c. have used, time whereof, &c. though he be not a corporation, and has the office only at will. Ibid.

So, the Ch. J. of B. may prescribe, that he and all Ch. Justices of B. have used to grant such offices. Ibid.

So, a serjeant at law, that he and all serjeants have used to be impleaded by bill, and not by original. 2 Rol. 264. l. 10.

An attorney, that he and all attorneys of the same court have privilege. 2 Rol. 264. l. 15.

An under-sheriff, that he and all under-sheriffs have used to take such fees. 2 Rol. 264. l. 27.

**(B) Who not.**

But where an officer is only at will, it is more proper to allege a custom, than to make a prescription; as, the Ch. Justice of B. may allege a custom, that every Ch. Justice of B. hath used to make a grant of such an office. 2 Rol. 264. l. 20.

So, a sheriff cannot prescribe, that he and all sheriffs have used, &c. for he is but an annual officer, and removeable at will. 2 Rol. 264. l. 23.

[None can prescribe (for right of common) but such whose interests are permanent; therefore tenant at will or for life cannot prescribe, nor the occupier of a house; but they may in the usage and custom of the vill. 2 Wils. 258.]

[A copyholder cannot prescribe in a *que estate*, because the freehold interest is in the lord. Doug. 713.]

**(C) What things may be claimed by prescription.**

All franchises or privileges, which a man may have without a title appearing

appearing upon record, he may claim by prescription; as, waifs, estrays, wreck, treasure-trove, &c. Co. L. 114. b. 2 Rol. 270. l. 45. 5 Co. 109. Vide Waife. Vide Franchises, (A 1.)

So, royal fishes; as, whales, sturgeons, &c. Co. L. 114. b.

So, a park, warren, &c. Ibid.

So, fairs, markets, frank-foldage, toll, &c. Ibid.

[The general rule with regard to prescriptive claims is, that every such claim is good, if by possibility it might have had a legal commencement. An exception to this rule is the claim to toll thorough, where it is necessary to shew expressly for what consideration it was granted; though there seems to be no reason for the exception. 1 T. R. 667.]

A corporation may be by prescription. Ibid.

So, a man may claim, by prescription, liberty to hold courts, a court-leet, hundred, &c. Co. L. 114.

The custody of a gaol, &c. Co. L. 114. b.

So, a man may claim by prescription, to be tenant in common with another. Lit. s. 310. 2 Rol. 264. l. 32.

[So, a man may prescribe to be exempted from serving on juries; these exemptions are not taken away by any of the statutes concerning juries. Doug. 188.]

#### (D) What not.

But franchises or liberties, which cannot be seised as forfeited before the cause of forfeiture appears upon record, cannot be claimed by prescription, as, *bona et catalla proditorum, felon., felon. de se, fugitivor., utlagat., aut in exigend. positor.* Co. L. 114. a. 2 Rol. 270. l. 20. Vide Waife (B — C — D). Vide Franchises, (A 2.)

Deodand, sanctuary, &c. Co. L. 114. a. Vide Waife, (E 1, 2.)—Abjuration (D).

Privilege to make a corporation, coroner, conservator of the peace. &c. Co. L. 114. Vide Franchises, (F 5.)

To have a conusance of pleas, &c. Co. L. 114. a. Vide Courts, (P 3.)

So, a man cannot make title to land, by prescription. Co. L. 114. b. 2 Rol. 264. l. 3.

Nor can he claim to be joint-tenant with another; for the survivor takes. Co. L. 195. b.

Yet a man may claim a county palatine by prescription, and in respect thereof, to have *bona et catalla felon., &c.* Co. L. 114. b. Vide Franchises, (D 1.)

#### (E) What shall be a good prescription.

##### (E 1.) Must be time out of mind.

To every prescription there are two inseparable incidents; time and usage. Co. L. 113. b. Vide Copyhold, (S 2.)

Prescription and time, whereof no memory runs to the contrary, are all one in law. Lit. s. 170.

And this is understood, not only of the memory of any one living, but

but also of proof by any record or writing, or otherwise to the contrary; for that shall be said within memory. Co. L. 115. a.

[Thus a lease of ground for fifty-six years, to be a passage, shews it is not by prescription; and suffering it to be used for three or four years after the expiration, will not amount to a gift to the public. Str. 909.]

And therefore where there is any proof of the commencement, or original, of any thing, it cannot be claimed by prescription; as, if a vicarage be endowed *de minutis decimis* 1310, and the parson appropriate be sued by the vicar for them; the parson cannot prescribe against such demand; for his prescription must begin after the endowment, which is within time of memory. R. 2 Rol. 269. l. 50.

So, though a prescription be alleged for things spiritual or ecclesiastical, it ought to be time whereof, &c. though, by the canon law, it is restrained to forty years. 2 Inst. 653.

Yet where the commencement and original were before the time of king R. 1. it may be claimed by prescription; for all time before R. 1. is called time out of memory, upon an equitable construction of the st. W. 2. which limits it for a writ of right. 2 Rol. 269. l. 10—45.

[A grant or charter from the crown, which ought to be by matter of record, may, under circumstances, be presumed, though within time of legal memory. Cowp. 102.]

[A presumption founded on a possession of 350 years was adjudged by the court a sufficient ground. Ibid.]

And therefore in an annuity claimed of a prior by prescription, if it be pleaded that the priory was founded within memory, he ought to shew the foundation since the reign of R. 1. began. 2 Rol. 268. l. 25. 269. l. 50.

So, a charter, &c. before the time of R. 1. may be used as evidence of a prescription for a thing granted by the charter. 2 Rol. 268. l. 5.

[The rule with regard to prescriptions is, that every prescription is good, if by any possibility it can be supposed to have had a legal commencement. 1 T. R. 667.]

[An ancient grant without date does not necessarily destroy a prescriptive right; for it may be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. 2 Bl. Rep. 989.]

[Possession for above 100 years of a pew in a church is not a sufficient title to maintain an action on the case for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish. 1 T. R. 428.]

[Uninterrupted possession of a pew in the chancel of a church for thirty years, is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer; but that presumption may be rebutted by proof that the pew was not in existence thirty years ago. 5 T. R. 296.]

### (E 2.) Must have a long and quiet usage.

So, every prescription ought to have long, continual, and peaceable usage, or enjoyment. Co. L. 113. b.

And

And therefore, if repeated usage cannot be proved, the prescription fails.

So, if an usage within time of memory cannot be proved, the prescription fails; as, if a town was incorporated before the time of R. 1. and their franchises were never afterwards used, they are lost. 2 Rol. 268. l. 52.

Yet a tortious interruption of the usage, for ten or twenty years, does not destroy a prescription; as, if a prescription be alleged of a *modus* for tithes of lambs, and it be found that such *modus* was paid, time whereof, &c. till twenty years last, and for that time tithes in specie; yet the verdict is for the prescription. Co. L. 114. b. 2 Inst. 653.

So, if the plaintiff in a writ of mesne prescribes for acquittal, and it be found, that at all times there was acquittal, till a purchase by the grandfather of the plaintiff, and since no acquittal, the verdict is for the plaintiff. Co. L. 114. b. 2 Rol. 271. l. 40.

If a man prescribes for common, and the usage was discontinued for many years by a lease of the terre-tenant. 2 Inst. 654.

If tenants of antient demesne, by coercion, have paid toll, &c. for many years. 2 Inst. 654.

[If an impropiator makes a lease of a farm, and all tithes thereto belonging, or therewith usually letten, and afterwards makes a lease of the rectory, and the lessees of the rectory have usually received the tithes of the farm, and the lessees of the farm never have; the tithes shall be paid to the lessee of the rectory. But as to the impropiator himself, Q. Bunb. 274.]

### (E 3.) Must be certain.

So, a prescription ought to be certain; and therefore, a custom or prescription for copyholders paying to the lord, for a fine upon a death, two years' rent or less, is ill. R. 2 Rol. 264. l. 54. Vide Copyhold, (S 19.)

So, a prescription to pay for tithes 1*d.* or thereabouts for every acre of arable. R. 2 Rol. 265. l. 5.

But a prescription, that *magna pars rivuli* runs, &c. is good; for it is not necessary to show how much. R. 4 Co. 88. b.

[And a prescription to take three bushels of barley out of every ship's cargo of barley brought upon the key for exportation, is good. Str. 1228. Wils. 91.]

That he ought to have, as appurtenant to his house, so much *estovers* as a man can dig in one day, without saying, to be burnt in his house; for it is ascertained by being confined to so much as a man can dig in one day. R. 1 Lev. 231.

### (E 4.) Must be reasonable.

So, every prescription ought to be reasonable; and, therefore, a man cannot prescribe for an heriot upon the death of every stranger within his manor. Vide Copyhold, (S 3, &c.)

Nor, for warren in the lands of a stranger, which are not within his fee, or seignior. 2 Rol. 265. l. 52.

Nor, for setting out his tithes without the view of the parson. R. Hob. 107.

So, a man cannot prescribe, that he and his ancestors, seised of the manor of C., have been exempted from the government of the mayor of London (where it lies) and his officers; for what would be to be without government. R. 2 Rol. 265. l. 20.

Nor, that he has the assize of bread and ale, and the search and correction of weights and measures, without having a court for it; for that is proper to the leet. R. 2 Rol. 265. l. 25.

Nor, that no forester, sheriff, &c. intermeddle in his manor, if he has not a court there. Jon. 271.

So, a sheriff cannot prescribe for the taking of gifts for doing his office. 2 Rol. 266. l. 10. 50.

So, a lord of a leet, who has no land besides his leet, cannot prescribe to have the wasts of the town where his leet is, against the lord of the same town. 2 Rol. 266. l. 52.

But a prescription may be reasonable, though it be unusual, or inconvenient; as, a man may prescribe for a way over a church-yard, or through the church. 2 Rol. 265. l. 40.

For *estovers* for repairing or building new houses. Per three J. 2 Cro. 25.

So, a corporation may subscribe for 3*d.* per pound of all merchandize in such a port, in respect that it is owner of the port, and maintains the key, and a crane, and perches for the directing ships in the channel. R. 2 Rol. 265. l. 30. Vide Copyhold, (S 18.)

A lord of a manor may prescribe for foldage, and that none erect hurdles there in his own land, without licence. R. 1 Leo. 11.

[A lord of a manor may prescribe for toll of all goods landed within the manor in consideration of repairing a wharf within the manor; though the prescription be laid more extensively than the consideration alleged. Cowp. 47.]

[The lord of a franchise is not, as such, bound to repair a gaol within it; but he may be subject to such a charge by immemorial usage. 6 T. R. 373.]

### (F) What shall not be good.

#### (F 1.) Prescription against the king.

But a prescription is not good which runs against the king's right; for *nullum tempus occurrit regi*. 2 Rol. 364. l. 40. [Vide stat. 9 Geo. 3. c. 16. Vide Copyhold, (S 12.)]

As, if the king was patron of right of a chapel, no other can have it by prescription. 2 Rol. 364. l. 42.

[Yet if a man claims tythe-hay, under an express grant of the king, and has never received any for many (as 120) years, he shall not recover it. Bunb. 262.]

So, a man cannot prescribe to have, or be discharged of, the great custom, which is an antient revenue of the crown. R. 2 Rol. 264. l. 45.

So, a prescription for toll, wreck, &c. does not extend to the king's goods. Dav. 33. b.

#### (F 2.) To do a wrong, or a nuisance.

So, a man cannot prescribe to do a wrong or a nuisance; as, to erect a dove-cote. R. 2 Rol. 265. l. 10. 2 Cro. 491.

To

To put logs *passim*, or wood for a continuance, in the highway. R. 1 Rel. 265. l. 15. R. 2 Cro. 446.

To make assart or wast. Semb. Jon. 271.

So, a corporation cannot prescribe to arrest upon suspicion of fee only, and imprison for three days, and then send to the common gaol. 2 Rol. 265. l. 50.

(F 3.) Contrary to a statute.

So a man cannot prescribe against a statute; for that is the highest record. Co. L. 115. a. Vide Copyhold, (S 5.)

But he may prescribe against a statute, where his prescription is preserved by another statute. Co. L. 115. a.

And therefore a custom in London, that an apprentice to one trade within the city, may use any other trade there, shall be good, notwithstanding the st. 5 El. 4. Semb. Cro. Car. 347. 516.

So, where a statute is in the affirmative only, a man may prescribe for the same matter; as, the custom to devise remains, notwithstanding the statutes 32 & 34 H 8. which gives power to devise. Co. L. 115. a.

So, if a statute in the negative be only declaratory of the common law, a man may prescribe against the statute as well as against the common law; as, where the st. M. Ch. 35. says, that the leet shall be holden only *bis in anno*, at Michaelmas and Easter, which was the common law, the lord may prescribe to hold it at other times and often. Co. L. 115. a. Vide Leet, (C.)

Where the st. 34 Ed. 1. *de forestis*, enacts, that none shall cut down his trees in a forest, without the view of the forester, which was the common law, a man may prescribe to cut down, without his view. Co. L. 115. a. R. cont. Jon. 270. 291. Vide Chase, (N 3.)

(F 4.) Contrary to another prescription, &c.

So, a man cannot prescribe against another prescription; for the one is as antient as the other; as, if a man prescribe for a way, light, or other easement, another cannot prescribe for liberty to stop it when he pleases. R. 9 Co. 58. b. 2 Mod. 105. Vide Copyhold, (S 17.)

So, a man cannot claim, by prescription, a liberty given to him by the common law; as, for privilege to abate a nuisance.

To distrain for a rent-service.

To pay tithes without fraud. R. Hob. 107.

So, a man cannot controvert the commencement of a prescription; as, if a man prescribes for rent, and to distrain for it, it cannot be alleged that it was always paid by coercion. Co L. 114. a.

But, a man may prescribe, that a lord, for him and his tenants, hath paid so much; and in respect thereof, he and his tenants were discharged of tythes; and that he is tenant of a tenement, which time whereof, &c. was parcel of the manor; though the one prescription must be prior to the other. R. Yel. 2.

So, he may prescribe for holding a court, and that the court, time whereof, &c. issued process. R. 1 Sal. 203.

So, he may prescribe for a thing, which qualifies another prescription;  
H 2

scription; as, if A. prescribes for common, B. may prescribe to inclose, when he has lands lying there together. Semb. 2 Mod. 104.

### (G) How a prescription shall be destroyed.

If a man prescribe to a thing which is totally destroyed, the prescription is gone; as, if the repair of a castle be claimed by prescription, and the castle be demolished, the prescription is destroyed. 4 Co. 88. Vide ante, (E 1, &c.) — Dismes, (E 13. 20.)

So, if a man has franchises by prescription, and the king grants the same liberties to him by charter; he cannot afterwards claim them by prescription. When extinguished by unity of possession, vide Suspension (G.)

So, if a *modus* be not entirely settled, payment in kind destroys it. Sav. 13. Vide Dismes, (E 20.)

But, a circumstantial variation in a thing, to which a prescription is annexed, does not destroy the prescription; as, if a man prescribe *in modo decimandi* for the tythes of a park; if it be disparked, the prescription continues; for it is annexed to the lands. R. Hob. 39. Vide Dismes, (E 20.)

Or, for tythes of a mill, and two new mill-stones are added. Dub. Sho. 281. R. 4 Mod. 45.

If a corporation prescribes, and afterwards has a new name, &c. the prescription continues. 4 Co. 87. b.

If a man prescribes for a water-course to a fulling-mill, and he converts it to a grist-mill. R. 4 Co. 87.

So, if he claims *estovers* to a house, which is pulled down; if it be afterwards rebuilt, the prescription revives. Hob. 39. 4 Co. 87. b.

### (H) How pleaded.

[All prescriptions are in their nature entire; and when they are pleaded the adverse party cannot deny a part only, but he must either demur or traverse the whole. If the defendant plead a prescription, and fail in proving any part of it in evidence, he must fail in the whole. 4 T. R. 159.]

[Where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of his right, a grant is presumed, and the right must therefore be claimed by prescription; but when the claim depends upon a general rule of property within certain limits, it must be alleged as a custom, or *lex loci*. 5 T. R. 412.]

Every one who pleads a prescription, ought to allege it in him who has the inheritance; as, to say that he is seised in fee, and he and his ancestors, or he and all those *quorum statum ipse habet*, &c. Co. L. 113. b. Vide ante, (A).

Or, that a corporation and their predecessors. Co. L. 113. b.

[Therefore, if tenant for years pleads a prescription in his own name, it is bad; it ought to be in the lord's, who is tenant in fee. Fort. 340.]

And therefore, where a copyholder prescribes for common, &c. *in alieno solo*, he ought to prescribe that the lord of the manor, who has the fee, time whereof, &c. had common there for him and his tenants. R. 4 Co. 31. b. Vide Copyhold, (P 4.)

And

And where common is claimed in the soil of the lord, so that he cannot prescribe in him, he ought to allege it by way of custom; for he cannot prescribe in himself, in respect of the baseness of his estate. R. 4 Co. 31.

[A copyholder cannot prescribe in a *que* estate. Dougl. 713.]

So, a man cannot allege a prescription for common, or other profit, *in alieno solo*, in the inhabitants of a town, or of the antient houses of a town *ratione residentie*; for the inhabitants, perhaps, have not the inheritance. R. 6 Co. 60. 2 Cro. 152. 2 Leo. 44. Godb. 97. R. 2 Cro. 446.

So, he cannot prescribe, that every *pater-familias* of an antient house had common, &c. for, perhaps, he was but tenant for years, at will, by statute-staple, &c. R. 6 Co. 61. a.

So, it is not good that every freeman of a corporation had common; but he ought to prescribe in the corporation. R. 2 Jon. 115.

So, he cannot prescribe, that A. tenant for life, and B. in remainder, ought to have common. Dub. 1 Leo. 177. Cro. El. 154.

That A. who has a grant to be parker for his life, and his predecessors have, time whereof, &c. Semb. Dy. 71.

So, he cannot say, all the possessors of such land ought to make fences. Semb. 2 Cro. 665.

So, if a jury finds that all occupiers have used to repair, it is not a good finding of a prescription; for, perhaps, the occupiers were only particular tenants, and their acts do not bind the inheritance. R. 5 Co. 99. b.

Or, a declaration alleges a custom, that all occupiers of a close ought to have a way, &c. R. Cro. Car. 419. Jon. 367.

So, if it be alleged, that A. *et omnes tenuram illam habentes*, have used, &c. it is not good. Godb. 54.

But inhabitants, &c. may prescribe for an easement, &c. *in alieno solo*; as, for a way, &c. 6 Co. 60. 2 Cro. 152. Semb. (cont.) Cro. El. (441.) 180. Cro. Car. (R. acc.) 419.

So, inhabitants may prescribe to have sacraments administered, or for burial in the church-yard. 2 Rol 264. l. 16.

So, to be discharged of toll. R. 2 Sho. 257.

So, for the privilege of dancing in the close of another. R. 1 Lev. 176.

[A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes, in the close of A., at all seasonable times of the year, at their free will and pleasure, is good. 2 H. Bl. 393.]

[A similar custom for all persons for the time being, being in the said parish, is bad. Ibid.]

[A custom, that "where the customary tenant of a manor has coal-mines lying under the freehold lands of other customary tenants, within and parcel of the manor, he may sink pits in those lands to get the coals, &c.; may lay the coals when got, and the earth and rubbish, &c. on the land near to such pits, such lands being customary tenements and parcel of the manor, there to remain and continue (not saying how long or for a convenient time); may lay and continue wood there for the necessary use of the pits; may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts there at his will and pleasure,"

is a bad custom, as being uncertain and unreasonable. *Willes*, 360.]

So, inhabitants may prescribe for a matter of discharge in their own soil; as *in modo decimandi*. 6 Co. 60. 2 Cro. 152. *Semb.* Hob. 86. R. Hob. 118. R. 3 Lev. 386.

So, it will be a good prescription to say, *quod tenentes, et occupatores* of such a close, ought to repair the fences; for *tenentes* imports the tenants of the fee. R. 1 Sal. 335, 336. *Semb.* 2 Cro. 665.

[So, though the parish at large be *primæ facie* bound to repair all high roads lying within it, yet, by prescription, they may throw the *onus* on particular persons, by reason of their tenure. 2 Term Rep. 106.]

That the burgesses in a corporation, inhabitants in messuages there, ought to have common; for the common is not alleged due to inhabitants, but to burgesses, who inhabit there; and to say that every burgess shall have it, is as well as that the corporation shall have it for them and every burgess. R. 2 Lev. 253.

That all farmers; for that is tantamount to all occupiers. R. (cont.) 2 Lev. 163.

When a man may prescribe by a *que* estate, vide *Pleader*, (E 23, 24.)

If a man claims, by prescription, a thing incident, &c. to another, he ought to say, that the thing, to which, &c. *est antiqua*; as, if he prescribes *in modo decimandi* to a park, he may say, *quod est antiquus parcus*. Hob. 44.

So, if he alleges an usage to put swine into a park, as incident to the office of parker. Dy. 71. b.

If he alleges a custom in a town, it is sufficient to say, *antiqua villa*. 10 Co. 59. b.

[A corporation may prescribe for a port duty, without showing they are owners of the soil, or that they repair. 3 B. M. 1402.]

If he alleges a custom in London, &c. he ought to say, *quod est antiqua civitas*. R. Cro. El. 169.

[A custom of London must be pleaded, or the court cannot judicially take notice of it. Str. 1187. 1 Wils. 8. 8 Atkyns, 44.]

But, if a thing is not directly mentioned, as that to which, &c. it need not be alleged; as, if he prescribes *in modo decimandi* in so many acres in such a park; it is not necessary to say, *quod est antiquus parcus*. R. Hob. 118. 44.

So, if there be words tantamount, it is sufficient; as, if he says, that the defendant diverted a water-course *à solito et antiquo cursu* to a mill, without saying, *quod est antiquum molendinum*. 3 Lev. 153. 8 Mod. 50.

So, if he says, *quod cum molendinum fuit ab antiquo erectum*. R. 1 Lev. 273.

That he stopped a window *per quam lumen inferri consuevit*. R. Sal. 459. (*Semb.* cont. upon a demurrer.)

Yet, where a park, office, or other thing is claimed by prescription, it is not sufficient to say, *quod est antiquus parcus*, &c. but he ought directly to prescribe to it. R. 10 Co. 59. b. Hob. 44.

If a man makes title to a thing by prescription, he ought to prescribe for it directly; and it is not sufficient to say, that he and all whose estate, &c. have used, &c. as if he prescribes for picage, for goods exposed in a market. R. 2 Jon. 227.

So,

So, regularly, he ought to prescribe in an usage; for it is not sufficient to say, that every tenant of a manor *potuit et potuisset sursum reddere*, &c. Ray. 4. 3 Leo. 83.

But, where a custom is alleged within London, it is sufficient to say, *ut possit*, &c. Semb. Cro. Car. 347. R. Ray. 4.

So, if a custom be an inducement only to an action, it is sufficient if it be alleged, *quod solet*, without saying, *solet et debet*; as, in covenant against an infant for departure from his master, being an apprentice, by the custom of London. R. 1 Lev. 12.

So, after verdict it will be well, if a thing be alleged by way of prescription, where it ought to be by custom. 1 Lev. 177.

[A plea of prescription for common in a *que* estate is good after verdict, though it be not in express terms alleged that the owners of the estate have used it time immemorial. 3 Term Rep. 147.]

[In a plea claiming a prescriptive right as appurtenant to the defendant's estate, he must state his title: 3 T. R. 766: 2 Wils. 258.]

[If a prescriptive right be pleaded, the whole, and not a part only, must be traversed by the replication. 4 T. R. 157.]

[Where a prescriptive right is claimed at all times; the meaning is, at all usual times. 2 H. B. 224.]

For more of title Prescription, Vide Chimin, (D 2.)—Dignity, (C 1.)—Dismes, (E 2, &c.)—Franchises, (F 4.)—London, (H)—Pleader, (C 38.)—Rent, (C 7.)—Tems, (G 12.)—Toll, (G 1.)

## PREAMBLE.

Vide PARLIAMENT, (R 11.)

## PREBEND AND PREBENDARY.

Vide ECCLESIASTICAL PERSONS, (C 4.)

## PRECEDENCE.

Vide JUSTICES, (D)—LEY, (D 2.)—NOBILITY, (A).

## PRELATE.

Vide CERTIFICATE, (A 1, &c.)—ECCLESIASTICAL PERSONS, (C 1, 2.)—EGLISE, (H 11.)—HERESY, (B 2.)—IRELAND, (E)—JUSTICES, (L 3.)—PLEADER, (S I 12.)—VISITOR, (A 5. 8.)

## PREMISES OF A DEED.

Vide FAIT, (E 3, 4.)

H 4

PRE-

**PRESENTATION.**

Vide **ESGLISE**, (H 1, &c.) — **PLEADER**, (3 I 5.) — **POPERY**, (B 8.)

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**PRESENTMENT.**

Vide **CHIMIN**, (C 11, 12.) — **COPYHOLD**, (F 10, 11. — M 7.) — **INDICTMENT**, (B — C) — **LEET**, (G 1, 2.) — **SEWERS**, (G) — **VISITOR**, (A 11.)

**Darrein presentment.**

Vide **QUARE IMPEDIT**, (C 1, &c.)

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**PRESENT ESTATE.**

Vide **CHANCERY**, (3 Y 8.) — **DEVISE**, (N 18.)

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**PRESIDENT OF THE COUNCIL.**

Vide **ROY**, (E 2.)

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**PRICES OF VICTUALS, &c.**

Vide **JUSTICES OF PEACE**, (B 89. 95. 99.) — **LEET**, (L 9. 14.)

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**PRIMER SEISIN.**

Vide **PRÆROGATIVE**, (D 59.)

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**PRINCE AND PRINCESS.**

Vide **JUSTICES**, (K 1, &c.) — **ROY**, (G).

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**PRINCIPAL.**

**Principal and accessory.**

Vide **JUSTICES**, (T 1. &c.)

**Principal and bail,**

Vide **BAIL**, (Q 2, &c. R 3, &c.)

**Principal and incident.**

Vide **PROHIBITION**, (G 23.)

**Principal and interest.**

Vide **CHANCERY**, (3 S 1, &c. — 3 Y 9. — 4 A 1, &c.)

[PRINCIPAL AND SURETY.]

[(A) What shall be considered a contract of indemnity.] *infra*.

[(B) Legal operation of.] *infra*.

[(C) Construction of.] *infra*.

[(D) Duration of.] p. 106.

[(E) Discharge of.] p. 108.

[(F) Payments in discharge of.] p. 109.

[(G) Indemnity from another quarter.] p. 109.

[(H) Rights of surety.] p. 109.

[(I) Rights of a co-surety.] p. 109.

[(K) Judicial proceedings.]

[(K 1.) Form of action.] p. 110.

[(K 2.) Declaration.] p. 110.

[(K 3.) Plea.] p. 111.

[(A) What shall be considered a contract of indemnity.]

[A written paper addressed by A. to B. in the following terms, "You may safely trust C. for the order in question; indeed, I have no objection to guarantee against any loss from giving him this credit;" is not by itself a guarantee. 1 M. & S. 557.]

[A verbal declaration by A., that he would support the bank of X. with 30,000*l.* followed by a writing, "authorizing B. to assure the inhabitants of Y. and its vicinity, that he undertook to be accountable for the payment of the notes issued by the X. bank, as far as the sum of 30,000*l.*," made to stop a run upon the bank, does not render him liable at law to any individual note-holder. 16 East, 356.]

[A bond conditioned absolutely for the payment of money at a certain day, though it appeared to have been given by way of indemnity, is not an indemnity bond. 1 B. & P. 638.]

[(B) Legal operation of.]

[A guarantee under seal by a surety does not extinguish the debt of the principal. 6 T. R. 176.]

[(C) Construction of.]

[As against a surety, the contract cannot be carried beyond the strict letter. 2 T. R. 370.]

[An engagement to indemnify "and save harmless," obliges the one to

to save the other from incurring any expence, &c. and not merely to reimburse him when incurred. 8 East, 593.]

[The extent of liability created by an indemnity bond may be restrained by the recitals. 4 Taunt. 593.]

[To recover on a bond of indemnity from an action, &c. notice that a suit has been commenced is not necessary. The use of notice is, that if, after it has been given, the obligor refuses to defend, the judgment will be conclusive against him, that the demand was a just one; whereas, without notice, the obligee must be proved that fact by other evidence. 3 T. R. 374.]

[To recover on a bond of indemnity, it must be shown that the party was compelled by law to satisfy the demand. But it seems that if the damnification be by action, of which he gives the other side notice who refuses to defend it, upon which judgment goes against him, the other is estopped saying that the party was not bound to pay the money. 3 T. R. 374.]

[Notice from any quarter, that a clerk, whose fidelity the defendant has guaranteed, has embezzled property, is sufficient to charge him, at least unless the plaintiff has taken pains to conceal the fact from him. 1 B. & P. 419.]

[If the consideration paid for an annuity granted by two, is appropriated to the use of one only, the other being, within the grantee's knowledge, only a surety for the former on the annuity becoming void through default of the grantee in not making the necessary memorial, the consideration cannot be recovered against the surety by money had and received, though he joined in the receipt given for it. The grantee's claim is an equitable one; because, 1. The default out of which that claim arose was his own, and it was no part of the original contract that the money should be returned on a neglect to enter a memorial; 2. The action for money had and received is for an equitable, even where it also is for a legal, demand. 2 T. R. 366.]

[If the condition of a surety bond be the payment of a bill of exchange, on its being protested for non-payment; a protest for non-acceptance is not a substantial compliance with the condition. 6 T. R. 200. S. C. 163. 2 H. B.]

[The surety of a parish collector is liable, though the collector was dismissed before notice had been given to the surety that he was a defaulter, or indemnity demanded. 14 East, 510.]

[A party having contracted to guarantee a bill to be drawn for a specific sum, is not liable even to the extent of that sum on a bill which exceeds it. 2 Taunt. 206.]

### [(D) Duration of.]

[As every partnership ceases to be the same, if any alteration is made in the parties composing it, so the prospective operation of a guarantee, given to a partnership, will cease upon any change either by the death or withdrawing of any of the partners, unless the guarantee itself contain some provision contemplating such change, and continuing its operation to the succeeding partnership. 7 T. R. 254. 3 East, 484.]

[Future partners are entitled to the benefit of a security for the conduct "of a clerk of a company" (not incorporated) given to trustees. 12 East, 400.]

[In

[In the construction of bonds given by a surety for his principal's duly accounting for money received by him in a particular office or situation, though the words of the condition be general and indefinite as to time, yet shall the obligation be confined to that period, during which and which alone is the office by its constitution holden, if it appear in the condition, either expressly or by reference, that the office is periodical; for instance, annual. 2 M. & S. 363.]

[If a surety undertakes for the due conduct of his principal whilst in a particular office or situation, which by its constitution is an annual situation or office only, his undertaking expires with the year notwithstanding the principal continues in afterwards. 3 M. & S. 509.]

[If the frame or constitution of any society or partnership be materially altered, the prospective effect of a guarantee previously given will cease. 1 N. R. 34.]

[Surety for the services of J. S. to a sole trader does not extend to a subsequent partnership. 2 Blk. 934. 3 Wils. 580.]

[A bond by a surety, reciting that the principal was retained as a clerk to the obligee, and conditioned for his duly accounting to the obligee and his executors, does not extend beyond the life of the obligee, and, therefore, to his executors, who continue his trade and retain the clerk as before. The expression, "shall account to his executors," applies to monies received belonging to the testator; since, if his executors continue his trade, they do it in their personal capacities, not in their representative character. 1 T. R. 287.]

[A bond by a surety reciting that his principal was to be retained by obligees (bankers), as a clerk in their shop and counting-house conditioned for his duly accounting to the obligees, is not discharged by an alteration in the firm. It is notorious that a change of partners in a banking-house is constantly occurring; the parties, therefore, must have contemplated such event; and, had they intended that the sureties' liability should be discharged by it, would have said so. 1 T. R. 291.]

[A bond by a receiver of rents, reciting in the condition that he had agreed to collect rents for a certain company for twelve months, and that the company having required security for the performance of the said office in manner or to the effect after-mentioned, that A. B. had agreed to become surety for him; the condition contains more general words, binding him to his faithful service during such time as he should be employed by the said company and their successors. Held that the recital restrains the operation of the general words of the condition, and that the bond is not forfeited by any breach of duty after the expiration of the twelve months. 2 Smith, 654. 6 East, 607.]

[A guarantee "for any goods he hath or may supply my brother J. S. with, to the amount of 100l.," is a continuing or standing guarantee to that extent until recalled. 12 East, 287.]

[A bond reciting that A. had taken a house in the parish for a certain term, and conditioned to indemnify the parish against any charges resulting from A.'s becoming an inhabitant, continues during his inhabitancy (whether in the same house or not) though beyond the term. 1 M. & S. 120.]

[A bond is entered into by a surety and his principal, reciting that the principal having occasion for divers sums of money, not exceeding in the whole 3000l., had applied to the obligees to advance same, in such proportions

proportions as principal might require; conditioned for payment by principal and surety or either, all such sums not exceeding 3000*l.* as should at any times thereafter be advanced to principal. Held that the guarantee was not a continuing one, but became extinct on the first advance made to the amount of 3000*l.* 2 M. & S. 18.]

[The stat. 27 Geo. 2. c. 38. directs that a collector of parish rates to be assessed, &c. by virtue of that act shall be chosen, and security taken of him, for accounting for the monies he should receive. A collector is appointed in 1806; and, in 1810, a bond is taken from him, and two sureties, reciting the act of parliament; that in 1806 he had agreed to collect; that he was accordingly appointed; conditioned that he should account as often as required for the monies so collected and received by him, by virtue of said act and appointment. Held that the condition of this bond was not satisfied by the obligor's accounting for monies received between the day of his appointment and the date of the bond, but that he was bound to account not merely retrospectively, but prospectively also; as well for the period above mentioned as during all the time during which he should remain in office. The provisions of the statute were prospective; the bond was made with express reference to the statute, and, with the view of fulfilling its provisions, was bottomed upon the act; and therefore must, in the absence of the expression of an adverse intention, be interpreted by it. 3 M. & S. 502.]

[Where, from the terms of the condition, a more continued employment seemed to have been meditated, and no specific time was limited; yet it appearing that the office for which the security was given was an annual office, the court held the security at an end at the expiration of the first year. 2 N. R. 175.]

[A bond to five to indemnify them or any of them for advances made by them as bankers, does not extend to advances by four survivors. 4 Taunt. 673.]

### [(E) Discharge of.]

[The neglect of a party to look with sufficient attention into the accounts of a person in his employment, for whose fidelity he has taken security, is not such a *laches* as will discharge the surety at law. 10 East, 34.]

[A. guarantees B. on account of goods to be furnished to C. and is himself guaranteed by D.; he afterwards writes to B. to know whether the goods were furnished; receives no answer (B. having gone abroad); and thence supposing they were not, discharges D. from his guarantee. Held that A. was still liable to B., the goods having in fact been sent. 2 H. B. 613.]

[Credit given to the party whose solvency or fidelity has been guaranteed by another, does not discharge the latter. 1 B. & P. 419.]

[*Seemle*, that delay in calling upon a guarantee, does not exonerate him, unless it can be shown or presumed that he is a loser thereby. 1 B. & P. 419.]

[The solvent sureties in the grant of an annuity are not discharged by the bankruptcy of a co-surety. 4 Taunt. 90.]

[Indemnity given for a year to secure the sheriff against the acts of his bailiff. Afterwards the person undertaking gives notice, disliking the  
the

the person employed, that if the warrants are delivered to that person he will not abide by his indemnity. This notice was left at the office of the under clerk to the under-sheriff. Held, that the sheriff was not bound, and that the person who had given this indemnity could not discharge himself, unless by the consent of those on whose behalf it was given. *Lofft. 225. 228.*]

### [(F) Payments in discharge of.]

[If a party indebted on several accounts pays money generally, the creditor may apply the payment to which account he pleases. The rule holds the same, where the interests of a surety are concerned; as where a surety is liable on some of the accounts but not the others, the creditor may apply the payments in liquidation of the latter, even though these were outstanding when the surety became bound; since he had no right to suppose that his principal was not indebted, from the creditor omitting to acquaint him; for there was no duty imposed upon the creditor to inform him. *2 M. & S. 18.*]

[There is a bond by a principal and his surety conditioned for the payment of 9000*l.* by instalments; 1800*l.* are paid, when the principal becomes bankrupt, and the obligee proves under his commission, the principal sum remaining due 7200*l.*, and thereupon receives a dividend of so much in the pound. The surety is not entitled to have the whole sum received under the commission (and which was received before the next instalment became due) applied in discharge of the next instalment, but only so much in the pound, the same as was paid under the commission, thereby apportioning the payment to future as well as present instalments. *2 M. & S. 39.*]

### [(G) Indemnity from another quarter.]

[It is no answer to a claim on a contract of indemnity that the party is entitled to an indemnity from another quarter. *6 T. R. 413.*]

### [(H) Rights of surety.]

[A surety stands in the shoes of his principal, and is therefore affected by whatever affects his principal. *4 M. & S. 120.*]

[Where a surety pays the debt of his principal, the law raises an *assumpsit* on the part of the principal to repay him. *2 T. R. 104.*]

### [(I) Rights of a co-surety.]

[Though one surety is liable at law for contribution to his companion, whether bound in the same or a separate instrument, yet his proportion is rateable with reference to the total number of sureties. *2 B. & P. 268. Id. 270.*]

[A surety in an indemnity bond may bring an action for contribution against his co-surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety. *1 Moore, 2.*]

### [(K) Judicial

## [(K) Judicial proceedings.]

## [(K 1.) Form of action.]

[The law will not raise a contract where there is an express one already. If, therefore, a surety takes a counter-bond from his principal, he cannot, on payment of the money, sue him by *assumpsit*. If, too, the principal becomes bankrupt, and the bond may be proved under his commission, he will be discharged by his certificate, though the payment by the surety has been since the bankruptcy. 2 T. R. 100. Id. 640.]

## [(K 2.) Declaration.]

[In declaring on a guarantee, application to the principal for payment must be averred. It must also be proved; though in the case of a foreign purchaser slight evidence will be sufficient. 1 M. & S. 576. 4 M. & S. 574.]

[If the condition of a bond is that a servant shall not embezzle any money that shall come to his hands on account of his master, though the obliges in suing thereon must state some specific sum to have been embezzled, and how or from whom received. Doug. 214.]

[In debt on bond, conditioned that J. L. should from time to time, account for and pay over to the plaintiff as treasurer of a charity, such voluntary contributions as he should collect for the use of the charity, the defendant pleaded general performance; the plaintiff replied, that J. S. had received divers sums, amounting to a large sum, viz. 100*l.*; from divers persons, for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over, on special demurrer because the plaintiff had not named the persons from whom J. S. was supposed to have received the money, and so the breach was vague and uncertain; the court held it sufficiently certain, 8 T. R. 459.]

[A., B. and others, agreed to indemnify C. in certain proportions, in respect of bills to be drawn to such an amount, to which C. had agreed to become a party as security for money advanced to D. In an action by C. against A. on his guarantee, held that it was unnecessary to specify the dates and times of payment, &c. of the different bills, C. having averred that he had been obliged to pay them all. 14 East, 291.]

[In an action on an indemnity bond, conditioned for the accounting by J. S. of all monies received by him in a certain capacity, it is sufficient, in assigning a breach, to state a receipt by him in that capacity, of so much money; without specifying the items of which it was composed. 1 B. & P. 640.]

[To debt on bond, the condition of which was, "that A. B. should deliver a true account of all monies received by him in pursuance of his office," the defendant pleaded performance generally. The plaintiff in his replication assigned for breach, "that A. B. was requested to deliver a true account of all monies received by him in pursuance of his office, but refused so to do. Held, that this assignment of the breach was bad, in not alleging that A. B. had received any monies by virtue of his office, 1 Mars. 441. 6 Taunt. 45.]

(K 3.)

**[(K 3.) Plea.]**

[A plea must go to the time of the cause of action laid in the court. Thus in an action on bond against a surety for the misconduct of his principal in an office, for whose good behaviour he was bound; if he means to discharge himself on the ground that the office is an annual one, he must plead, not that the office is, but that it was such when the bond was made. 3 M. & S. 510.]

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**[PRINTER.]**

[By the custom of the trade, a printer is not entitled to any part of his demand, until the whole impression has been struck off and delivered. 1 Taunt. 137.]

[Where a printer undertakes to complete a work in a given time, and to insure the bookseller's paper, the period of insurance is not limited to that time, since there is no implied agreement on the part of the bookseller to furnish the printer within that time with the means of completing it; but the contract continues until the work is either completed or abandoned. 2 Taunt. 325.]

[It is not the custom of the London trade for the printer to insure the publisher's price. 2 Taunt. 325.]

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**PRINTING.**

Vide **CHANCERY**, (D 13.) — **Trade**, (B).

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**PRIOR.**

Vide **ECCLESIASTICAL PERSONS**, (B 2.)

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**PRIOR INCUMBRANCE.**

Vide **CHANCERY**, (4 A 10. — 4 I 6.)

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**PRIORITY.**

Vide **PRIVILEGE**, (C 2.)

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**PRISAGE.**

Vide **PRÆROGATIVE**, (D 45.)

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**PRISON AND PRISONER.**

Vide **ESCAPE** — **IMPRISONMENT** — **JUSTICES**, (R) — **JUSTICES OF PEACE**, (B 69.) — **OFFICER**, (G 8.) — **RESCOUS** — **USES**, (N 9.)

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**PRIVATE WAY.**

Vide **CHIMIN**, (D 1, &c.)

**PRIVILEGE.**

## PRIVILEGE.

## (A) Privilege to the person of a man to be free from arrest.

(A 1.) In attendance upon the courts. *infra*.

(A 2. a.) Within a place of privilege. p. 114.

(A 2. b.) Exemption from other causes. p. 114.

(A 3.) How discharged. p. 115.

## (B) Privilege to be excused from an office. p. 116.

## (C) Privilege in suits.

(C 1.) By being an officer to a court, &amp;c. p. 116.

(C 2.) By priority of suit. p. 117.

## (A) Privilege to the person of a man to be free from arrest.

(A 1.) In attendance upon the courts.

*Privilegium est jus singulare, seu lex privata, quæ uni homini vel loco conceditur.* Bl. Nom. verb. Privilege.If a man has a *subpœna*, &c. to attend the courts of justice in Westminster, and be arrested by process during his attendance upon the court, he shall be discharged. R. in Chancery, 1 Ch. R. 217.So, if he be in Palace-yard *sedente curiâ*; and the bailiff may be committed. 2 Mod. 182.So, he shall be protected *eundo et redeundo*. Semb. 4 Ed. 4. 21. a.

Though he goes forty leagues out of his way. Bro. Priv. 4.

[A party who has attended his cause all day in court, and in the evening retires to dine with his attorney and witnesses at a tavern in Palace-yard, is privileged from arrests, *causâ redeundi*. 2 Bl. Rep. 1113.][A suitor is privileged in a *bonâ fide* attendance during the sittings in which his cause is to be tried, though before the appointed day. 11 East. 4, 3. 9.]

[But false imprisonment does not lie for such an arrest; it is a breach of the privilege of the court, for which an attachment will be granted. 2 Bl. Rep. 1190. Dougl. 675.]

[If defendant, returning from court to justify bail, is arrested, he shall be discharged. Barnes, 27.]

[Attorney waiting till judge comes, to attend a summons, and the hour expires, if arrested shall be discharged. Barnes, 378.]

So, if the defendant himself attends the trial of his cause, and be arrested in *facie curiæ*, he shall be discharged. R. 1 Brownl. 15.[So, the party to a cause is protected during his attendance on an arbitration under a rule of *nisi prius*. Case of Hetley, in the exchequer, Tr. 1788. 3 East, 89.]So, the plaintiff shall have privilege, if he be arrested by the defendant *veniendo ad curiam* to attend his cause. Bro. Privil. 57.So, a *cestuy que use* who attends a suit by his feoffee. Bro. Privil. 1.

Or,

*Privilege to the person of a man to be free from arrest.* 113

Or, a servant or farmer, who brings money to his master or lessor (plaintiff or defendant) for the suit. Bro. Priv. 1.

[All persons who have relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process so to do, (such as bail,) are privileged from arrest *cundo et redeundo*; provided their attendance be not for any unfair purpose, such as in the case of bail for an insolvent person to justify. 1 H. Bl. 636. 1 M. & S. 638.]

So, this privilege extends to a party or witness, who attends in inferior courts of record; as, in the courts in London. Semb. 1 Brownl. 15.

In a session of the peace. Ray. 100. 1 Lev. 159. Bro. Priv. 35. Crom. J. 162. (180. edit. 1617.)

[A person attending the insolvent debtors' court, for the purpose of opposing the discharge of a debtor, is privileged the same as when in attendance upon any other court. 2 Mars. 57. 6 Taunt. 356.]

In the lect, as a juror. Latch, 198.

If a justice of peace, clerk of the peace, or other officer, be arrested *veniendo* to sessions. Crom. J. 162. (180. b. edit. 1617.)

[A barrister on the circuit is privileged from arrest. 1 H. B. 636.]

[A capital burgess of a borough attending an election of co-burgesses under a summons from the mayor, issued in obedience to a *mandamus* directing the corporation to proceed to such election, is not privileged from arrest during his attendance there for that purpose. 1 Moore, 413.]

[A person attending commissioners of bankrupt, or other commissioners under the great seal, under their summons, is not liable to arrest. Semb. 1 Atkyns, 54.]

[But the court of B. R. refused to discharge a person in custody by process of the sheriff's court in a cause afterwards removed into B. R. because he was arrested while attending commissioners of bankrupt to prove a debt. 4 T. R. 377.]

[The privilege exempting a witness attending a cause from arrest *cundo, morando, et redeundo*, extends to a defendant attending the arbitrator to whom the cause has been referred by rule of court. 3 East, 89.]

[Semb, if a trial be over in the afternoon, and a witness stay in the town till eleven o'clock the next morning, his home being distant only twelve miles, his *subpoena* is no protection to him from arrest in the town. 1 Smith, 355.]

So, if a party attends to take out an original writ, writ of error, or pardon of outlawry, &c. Bro. Priv. 22.

So, privilege extends to the horse, money, or other necessities for his journey, which the party has with him. Bro. Priv. 6. 8. 27.

In an action against a sheriff for an escape he shall plead such a discharge. 1 Brownl. 15.

Or, if the discharge be by order of chancery, the sheriff shall have an injunction. R. 1 Ch. R. 218.

But, if a man be not arrested in *facie curiæ*, he cannot be discharged. R. 1 Brownl. 15. Semb. 2 Mod. 182. for there the party arrested found common bail.

Though he pleads the custom of London for his discharge. 1 Brownl. 15.

So, a man cannot have a writ of privilege for his discharge. *Semb.* Ray. 100. 1 Lev. 159. but upon oath he shall be discharged. *Crom. J.* 162. b. (180. b. edit. 1617.)

So, a man who attends the court without process, or necessity, to do a voluntary act there, shall not be privileged *eundo et redeundo*; as, if a defendant goes to the court to confess an indictment. 2 *Ann. Sal.* 544.

So, if a juror in a leet be arrested by process out of an inferior court, B. R. will not grant an attachment, as if it was in their court; but an information. *Latch*, 198.

So, if a servant of the king be arrested, without licence of the king, or the lord chamberlain, or notice to him. 2 *Keb.* 3.

But, an execution shall not be discharged, but the party committed, if he do not consent to the discharge of him arrested. 2 *Ca. Ch.* 69.

So, if he be taken in execution, he shall not be dismissed; for then the creditor would be without remedy. *Crom. J.* 162. b. (180, 181. edit. 1617.)

[Yet defendant taken in execution, whilst attending writ of inquiry as attorney, was discharged. *Barnes*, 200.]

So, a servant of the king, being arrested, shall not be discharged by letter of the chamberlain, or rescued by his servants; for it is the king's privilege. 2 *Keb.* 3.

[A servant of the king's taken in execution is entitled to be discharged on motion. 5 *T. R.* 686. *T. Ray.* 152.]

[This privilege extends not to capital crimes; thus defendant, appearing upon his recognizance, was arrested in court upon a new warrant, for treasonable practices. *Str.* 530.]

[A volunteer is not privileged from arrests, under an act privileging impressed men. 1 *B. M.* 466.]

#### (A 2. a.) Within a place of privilege.

So, if a man be arrested within a place having privilege, as in Westminster-hall, *sedente curiâ*. 3 *Inst.* 141.

Or, in the king's palace at Westminster, or other palace where the king resides. *Ibid.*

So, if a summons or citation be served there, the person shall be imprisoned. 3 *Inst.* 140, 141.

But, an exemption from arrest shall not be allowed within an inn of court. *R. Skin.* 685.

#### (A 2. b.) Exemption from other causes.

[If a defendant in custody become insane, the court will not discharge him on filing common bail. 2 *T. R.* 390.]

[A prisoner is not entitled to be discharged on the ground that he was insane when arrested. 4 *T. R.* 121.]

[A court of law has no jurisdiction to discharge a lunatic from arrest. 2 *B. & P.* 362.]

[The having sued out a commission of bankruptcy on the same debt, is no ground for a discharge on common bail. 3 *B. & P.* 6.]

[A defendant was seized on a Sunday, and detained till next morning, and then arrested upon process out of the exchequer. The arrest is

*Privilege to the person of a man to be free from arrest.* 115

is void, and cannot be made good, even by a subsequent consent. 1 Anst. 85.]

[A defendant illegally in custody at the suit of one plaintiff, is not privileged from arrest at the suit of another, unless there be some collusion. 3 Blk. 823.]

[The king's servants are privileged from arrest, in whatever way the debt was contracted; since the privilege is the king's, not of the servant. 2 Taunt. 167.]

[Volunteer drill serjeants, under stat. 44 Geo. 3. c. 54. s. 20, 21. are not privileged from arrest for debts under 20*l*. 8 East, 105. 11 East, 315.]

[The protection from arrest afforded to soldiers under the mutiny-act is confined to civil actions; therefore, a soldier on whom an order in bastardy has been made, may be committed for disobeying it, until he finds sureties for payment of the allowance under it. 2 T. R. 270. 5 T. R. 156.]

(A 3.) How discharged.

If a man be arrested or sued, contrary to his privilege, he shall have a *supersedeas* out of chancery. Bro. Priv. 12, 13. Th. Br. 298, 299.

Or, if his privilege be as an officer of the exchequer, he may have a *supersedeas* out of the exchequer. Bro. Priv. 8. 16. 25.

So, if he be arrested and in custody, he may have a *habeas corpus*. Bro. Priv. 10, 11.

So, if he be privileged to be sued in another court, he shall plead his privilege. Vide Abatement, (D 4; &c.)

So, he shall have a writ of privilege, which contains a *supersedeas*: Dy. 287. a.

And if the inferior court proceeds after the *supersedeas*, or writ of privilege delivered, it will be null, and *coram non judice*. Bro. Priv. 28.

As, an officer of B. R. shall have a writ of privilege for his discharge, if in custody, by process of C. B., unless it be in a real action. Th. Br. 171.

[Attorney of C. B. returning from taxing costs, arrested by process of B. R., C. B. cannot discharge him, but will grant rule against officer. Barnes 200.]

[A privileged person when arrested, is entitled to be discharged on motion. 5 T. R. 686.]

[The grounds upon which a witness is entitled to be discharged from arrest are, that the arrest is a contempt of the court to which the party was giving his attendance; to such court, therefore, must application for a discharge be made. Hence, the court of K. B. refuse to discharge one arrested by process of another court whilst attending commissioners of bankrupt. 4 T. R. 377.]

[A defendant arrested by *quo minus* out of the exchequer, while protected by the privilege of C. B. as a suitor there, may be discharged by either court. 3 Anst. 941.]

[An attorney who is arrested by *capias* on a special original out of the same court, is not entitled to his discharge on serving the sheriff with a writ of privilege, but must plead in abatement. 2 Blk. 1085. p. 58.]

**(B) Privilege to be excused from an office.**

An attorney shall have privilege, that he be not chosen to the office of churchwarden. 2 Rol. 272. l. 15. Th. Br. 299.

That he be not overseer, constable, &c. Th. Br. 300. Off. Br. 160. 162. Vide Attorney, (B 16.)

[Attornies are not privileged from serving in the militia, or paying for substitutes in their stead. 2 Bl. Rep. 1123.]

[The deputy to the foreign opposer allowed writ of privilege to exempt him from serving constable. Bunb. 24.]

[A baptist preacher qualified according to the stat. 1 W. & M. c. 18. is exempted from serving all parish offices, whether they existed before, or were created since that act, even though he be also engaged in trade. Willes, 463.]

[Allowed to a clergyman against serving the office of collector and expeditor to the commissioners of sewers. Str. 1107. Andr. 353.]

[Allowed to the deputy to the usher of the customs chosen headborough; for he is obliged to attend the court of exchequer.]

[An officer of the customs is exempt from serving the office of overseer of the poor, though he has not his writ of privilege at the time. T. R. 375.]

[But refused to the chief accountant of the navy-office chosen churchwarden; for he is not obliged to attend. Bunb. 255.]

[Writ of privilege lies not for a justice of peace not to be constable; he should apply to the sessions, under stat. 13 & 14 C. 2. c. 12. s. 15. Str. 698.]

**(C) Privilege in suits.****(C 1.) By being an officer to a court, &c.**

So, if a man be an attorney, or officer to B. R., C. B., &c. he has a privilege to be sued in the same court, and not elsewhere. Vide Abatement, (D 6.)—Attorney, (B 17, &c.)

So, if he be an accountant or minister of the exchequer, or his servant attending upon him in his office. Bro. Priv. 8. Vide Abatement, (D 6.)—Courts, (D 2.)

If he be a serjeant at law. Vide Ley, (D 3.)

But a servant to an officer of the exchequer, in husbandry, and not attendant upon the office, or his master, shall not have privilege. Bro. Priv. 8. 16.

So, if land lies in ancient demesne, the Cinque Ports, &c. *ubi breve domini regis non currit*, the suit shall be for it in the court of ancient demesne, &c. and not elsewhere. Vide Abatement, (D 1, 2, 3.)—Ancient demesne, (F 5.)—Franchises, (E 1, &c.)

[If an attorney die insolvent, having a bill due to him from his client, in which is included a clerk of the crown-office's bill, he may have a rule to be paid by the original client, and not come in for his share of the insolvent's estate. Str. 1126. 3 B. M. 1313.]

(C 2.)

(C 2.) By priory of suit.

[Where an attorney of one court sues an attorney of another, the privilege of that court which is possessed of the cause, shall be preferred. 2 Bl. Rep. 1325.]

So, if a suit be commenced in B. R., C. B., or other court of Westminster, and the plaintiff afterwards sues for the same cause in a base court, the defendant, arrested by process out of such base court, upon an *habeas corpus* shall be discharged; as, if a plaintiff sues in C. B., &c. and afterwards enters his plaint for the same cause in a court of London. Bro. Priv. 19. 24.

So, if he be afterwards arrested by process out of B. R. Bro. Priv. 22. 24.

So, a defendant shall have privilege, if he was arrested after the *teste* of the original in C. B., though before the return, if the writ be afterwards returned; for it has relation to the *teste*. Bro. Priv. 4.

Though the plaintiff be essoined, or does not appear in C. B. Bro. Priv. 5.

Or, be afterwards nonsuited; if the action was depending at the time of the arrest by process out of the inferior court. Bro. Priv. 5. 9. 19.

But a defendant shall not have privilege upon an arrest out of a base court, if the *teste* of the original in C. B. &c. be later than the arrest. Bro. Priv. 39. 53.

Or, if the arrest was before the return of the writ, and the writ never was returned. Bro. Priv. 5.

So, if after a suit commenced in C. B. a plaint be in London, to have a foreign attachment, and the defendant renders himself to prison there within a year and a day to dissolve the attachment, he shall not have privilege; for the render was gratis, and for his benefit. Bro. Priv. 6. Cont. Ibid. 29.

So, a defendant shall not have privilege if he be outlawed in the suit in C. B. before his arrest. Bro. Priv. 10.

If the action in C. B. was commenced by covin. Bro. Priv. 19. 31. 43.

**As to the privileges of peers of parliament,**

Vide DIGNITY, (F 1, &c.)

**As to the privileges of ecclesiastical persons,**

Vide ECCLESIASTICAL PERSONS, (D.)

**As to privilege of parliament,**

Vide PARLIAMENT, (D 17. — E 15.)

Vide more concerning Privilege, in Alien, (C 1, &c. 7, 8. — D 2.) Ambassador (B). — Antient Demesne, F 1, &c.) — Attorney, (B 16) &c. — Bankrupt, (D 32, &c.) — Cemetery, (A 3.) — Chancery, (D 10.) — Chase, (N 3, 4, &c. — O 1, &c.) — Convocation, (C). — Infant, (D 1, &c.) — Estates, (C 3. — E 3.) — Franchises, (E 1.) — London (L 1, &c. — M). — Physicians (B). — Prærogative, (D 32. 85.) — Roy, (F 1.) — University (B — C).

**PROCESS.****PRIVY.**

Vide CONFIRMATION.—FINE, (I 1.)—PLEADER, (O 1, &c.)

**PRIVY COUNSELLOR.**

Vide PARLIAMENT, (L 30.)—ROY, (E 2, &c.)

**PRIVY SEAL.**

Vide PATENT, (C 5.)

**PRIVY SIGNET.**

Vide PATENT, (C 6.)

**PROBATE.**

Vide ADMINISTRATION, (B 6. 8, 9.)—PROHIBITION, (G 16.)

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(A 1.) **Process; who may issue it.**

Process, in a large acceptance, comprehends the whole proceeding after the original, and before judgment. 8 Co. 157. b. Blackmore. Vide Amendment, (C 1.)

But, generally, it imports the writs which issue out of any court, to bring the party to answer, or for doing execution.

When the king grants an authority of oyer and terminer, the power to issue process is incident; for there cannot be oyer, if the party does not appear *gratis*, or be brought by process.

And therefore where justices of peace have power to outlaw another, they may issue a *capias utlagatum*. R. 2 Rol. 277. l. 35.

(A 2.) In what name.

All process out of the king's courts ought to be in the name of the king.

By the st. 27 H. 8. 24. all writs original or judicial, all indictments for treason, felony, or trespass, and all process, shall be in the king's name, in counties palatine, or other liberties in England or Wales.

(A 3.) Under what seal.

So, all process ought to be under the great seal.

By the st. 28 Ed. 1. 6. no writ which concerns the common law shall go out under any of the petit seals.

## (B) When process shall be returnable.

The days for the return of process are general or special. Co. L. 134. b.

By the st. 51 H. 3. *dies communes*; 32 H. 8. 21. & 16 Car. 6. in all real actions, (except writ of entry for a common recovery, right of advowson, and dower *unde nihil habet*,) if the writ come in, or be returnable in C. B. on any common return-day, day shall be given till the ninth return after, inclusive.

In writs of entry for a common recovery, right of advowson, and dower, *unde nihil habet*, till the fifth return, inclusive.

And by the st. 32 H. 8. 21. in any writ of dower, till the sixth return, inclusive. Vide 2 Inst. 124.

And by the st. 16 Car. 6. summons *ad warrantizandum* against a vouchee, upon appearance of the tenant in a writ of entry, or writ of right of advowson, (which before were made for nine returns inclusive,) shall be abridged to five returns, as it was used in a summons *ad warrantizandum* in a writ of dower *unde nihil habet*.

By the st. of Marl. 52 H. 3. 12. conf. by the 16 Car. 6. in an assize of *darrein presentment*, and *quare impedit*, *dentur dies de quindena in quindenam, vel de tribus septimanis in tres septimanas*.

Or, by consent of the parties, a longer day may be given, if such consent appears upon record. 2 Inst. 124.

By the common law, there ought to be fifteen days between the *teste* and return in summons and attachments. Co. L. 134. b. 2 Inst. 567. Mod. Ca. 146.

[If there are not fifteen days between *teste* and return of *capias*, the proceedings cannot be stayed, but the writ may be quashed; it is error, not irregularity. Barnes, 76. 409, 410.]

[If process is made returnable on a *dies non juridicus*, (as Ascension-day,) it shall be quashed. Bunb. 318.]

[In a suit by bill in B. R. the *essoins*-day is not a return; and if a *feri facias* is made so returnable, the execution is void, and the goods must be returned. 1 Wils. 155.]

[If a *distringas* be made returnable *die lune prox. post quinden. Trin.* it is right; for *quinden Trin.* is a Sunday. Str. 811. Lord Raym. 1528.]

[Next after eight days from, &c. is the same as next after the octave, &c. Semb. 2 B. M. 1187.]

By the st. art. *super chart.* 28 Ed. 1. 15. *en summons et attachments en plea de terre, de sormes conteigne la summons ou l'attachment le terme de 15 jours a tout la meyns, selonque la common ley.*

So, in re-summons and re-attachments. 2 Inst. 567.

So, in a *pone*; for it is in the nature of a summons. Ibid.

In a *venire facias juratores*; for it is a summons to the jurors. Ibid.

So, by the st. 16 Car. 6. in dower *unde nihil habet*, the *venire facias*, and all process, after issue joined, and before judgment, need not have more than fifteen days, any more than in personal actions.

So, it may be in process upon an information, &c. which does not go to outlawry. R. Sal. 699.

But if a summons be returned *tarde*, &c. the *alias* summons shall have nine returns between the *teste* and return. Co. L. 134. b. 2 Inst. 567. R. Dy. 252. a. Hutt. 43.

So, process to outlawry in the crown office shall be *de termino interminum*. Sal. 699.

So, process judicial in B. R. (in Middlesex particularly) may be *de die in diem*. Sal. 602.

[*Capias ad respond.* tested in Trinity, and returnable in Hilary, is void and a mere nullity. 3 Wils. 341. 2 Bl. Rep. 846.]

[One day between the *teste* and return of a special *latitat* is sufficient. Str. 917.]

So, by the st. 16 Car. 6. return from *Cra. Ascens. Domini* to *Cra. Trin.* shall be good, though there be not fifteen days between the *quarto die post C<sup>rm</sup> Ascens.* before the *essoins*-day of *Cra. Trin.*

So, by consent, other than the common days of return may be taken. Co. L. 134. b.

So, by common law, and by the st. *art. super chart.* 15. in an assize before the justices of B. R., C. B., or justices in eyre, the justices may give a special day in term, or out of term; and therefore an attachment in an assize need not have fifteen days before the appearance. Co. L. 134. b.

[If there are fifteen days between the *teste* and return, both inclusive, of a *scire facias*, it is sufficient. Hicks v. Jones, T. 13 G. Str. 765.]

And by the st. 32 H. 8. 21. & 16 Car. 6., special days, where usual, shall be allowed.

[In suits by bill, *feri facias* must be returnable at a day certain, or shall be quashed. Barnes, 213.]

[If *ca. sa.* against an attorney is returnable at general return, and not day certain, it shall be quashed, and defendant superseded. Barnes, 413.]

[On the traverse of an inquisition sent out of chancery to be tried in B. R. the *venire* must be returnable on a general return, and not on day certain. Wils. 77.]

So, in a writ of execution there need not be fifteen days between the *teste* and return; as, in a *scire facias* for executing a fine, or recovery in a real action. Co. L. 134. b.

Nor in a *scire facias*, against bail. [But there must be fifteen days between the *teste* of the first *sci. fa.* and the return of the second. 2 Bl. Rep. 922.]

Nor, in a *per quæ servitia*, &c. Co. L. 134. b.

Nor, in any judicial writ. Ibid.

Nor, in process against an infant to be inspected. Ibid.

In a *pone* by the defendant. Ibid.

Nor, in error. 2 Inst. 567.

Nor, in a *venire facias* upon an indictment for treason, or felony, taken in B. R. 2 Inst. 568.

[By stat. 24 G. 2. c. 48. in real actions, if writ is returnable

Cras. Anim. day shall be given Quind. Martin.

Cras. Martin. — Oct. Hilar.

Oct. Martin. — Quind. Hilar.

Quin. Martin. — Cras. Pur.

Oct.

Oct. Hilar.	<i>day shall be given</i>	Oct. Pur.
Quind. Hilar.	—	Quind. Pasch.
Cras. Pur.	—	Tres. Pasch.
Oct. Pur.	—	Mens. Pasch.
Quin. Pasch.	—	Quinque Pasch.
Tres. Pasch.	—	Cras. Ascen.
Mens. Pasch.	—	Cras. Trin.
Quinque Pasch.	—	Oct. Trin.
Cras. Ascen.	—	Quin. Trin.
Cras. Trin.	—	Tres. Trin.
Oct. Trin.	—	Cras. Anima.
Quin. Trin.	—	Cras. Martin.
Tres. Trin.	—	Oct. Martin.]

[There need be but fifteen days between *teste* and return of *venire*, and other process on writ of dower *unde*, &c. after issue joined, and before judgment.]

[All process having day from the fourth of Cras. Ascens. to Cras. Trin. are good.]

[Summons to warrant against vouchees on common recoveries had, abridged to four returns inclusive.]

[Courts may appoint special returns as usual.]

[The days of assize in *darrein presentment* and *quare impedit*, and the days to be given in attaint, stand.]

[The *quarto die post*, or day of appearance, is reckoned inclusive of the return-day, though that fall on a Sunday. 1 H. Bl. 9.]

As to the form of *teste* or process, vide Abatement, (H 1, &c. 14.)

### (C a.) Process in criminal cases.

By the common law, in an appeal, or indictment, for the death of a man, the process was a *capias*, and afterwards exigent and outlawry. Vide Appeal, (G 5.)

But for another felony there ought to be two *capias*'s before the exigent. Ibid.

By the st. 25 Ed. 3. 14. on an indictment of felony before justices of oyer and terminer, a *capias* shall go to the sheriff, and on a *non est inventus* returned, another *capias* to seize his goods, also returnable at three weeks, and if he be taken, or appear, before the return of the second *capias*, he saves his goods; otherwise, the exigent shall go. Vide Appeal, (G 5.)—Indictment (I).

By the st. 6 H. 6. 1. the writs of *capias* before exigent, against any indicted in B. R., shall be directed to the sheriffs of the county where the party dwells, as well as of the county where named in the indictment, having six weeks at least, or longer, if the justices in their discretion think fit, before the return; otherwise, the exigent and outlawry on it shall be void.

By the st. 8 H. 6. 10. on every indictment or appeal, for treason, felony, or trespass, against any, dwelling in another county, than where the indictment or appeal was taken, after the return of the first *capias*, another *capias* shall go to the sheriff of the county, where the party is supposed dwelling, returnable three months after date, if the counties be held monthly; if at every six weeks, then four months after; commanding the sheriff, if the party be not found, to make proclamation

ation at two counties, to appear at the return of the writ, in the county or franchise where indicted; and if then he appear not, the exigent shall go, &c.

[(C b.)] **Process in civil cases.]**

[A general warrant is illegal. 9 Burr. 1742. 1 Bl. 555. Lofft. 1.]

[Style of the court of King's Bench mistaken in the plaint for that of the common pleas, vitiates the judgment. Lofft. 184.]

[Where a sheriff is plaintiff, a *latitat* (c. gr.) directed to himself, is irregular. 1 Bl. 506.]

[Process from the superior courts to be executed in Southwark, must be directed not to the bailiff of that borough but to the sheriff of Surrey. 14 East, 289.]

[Though it is informal to address process to the sheriff of Durham direct, instead of through the chamberlain, the writ is not void; therefore, a bail-bond taken thereon is good. 6 T. R. 71.]

[The officers appointed by law to execute the civil process of the superior tribunals, and who alone are officers of the court, are the sheriff of the county, and the lord or bailiff of a franchise or peculiar jurisdiction; therefore, such process directed to the bailiff of the Isle of Ely, instead of the sheriff of Cambridgeshire, is a nullity, and the bailiff a trespasser for executing it. 3 East, 128.]

[For the purposes of executing process, the house of one man may be accounted that of another where he has permitted him to use it as his own by residence therein. 2 H. B. 120.]

[Process out of the palace court at Westminster may lawfully be executed within the palace, though the king is actually resident therein, and no leave has been obtained from the Board of Green Cloth. 3 T. R. 795.]

[Civil process cannot be executed in any of the king's palaces which are kept constantly prepared for his majesty's reception; though he may not reside therein. 10 East, 578.]

[An inner door may be broken open in the execution of civil process. Cowp. 1. Lofft. 375.]

[Outer door may be broken in executing process for a contempt. 4 Taunt. 401.]

[If a bailiff has made a legal arrest and the prisoner escapes, he may justify breaking open the door of the house upon fresh suit to retake him. Lofft. 382. 390.]

[In the execution as well of civil and criminal process, an officer may call in the assistance of others, who then may justify as the officer may do. 3 East, 128.]

[Though a bailiff gets in under a false pretence, yet he who resists him does it at his peril. Lofft. 62.]

[Proceedings are founded on the second writ in a continued process. 2 B. & P. 157.]

[A writ may be averred when issued in vacation. 15 East, 378.]

[To aver the issuing of a writ between the *essoign* and *quarto die post*, "the court then being at Westminster," is good. 3 T. R. 183. 3 T. R. 787.]

[Touching the indorsement of the time of filing the writ, see 3 T. R. 787.]

(D) **Process**

## (D) Process in real actions.

## (D 1.) Summons.

In all *præcipes quod reddat* (viz. all real actions properly and strictly for demand of land) the original process is a summons.

As, in a writ of right *quia dominus remissit curiam*, &c. right of advowson, *præcipe in capite*. F. N. B. 2 F. 5. J. 30. E.

In a writ of right of ward, *cessavit*, escheat, dower, *unde nihil habet*, and *formedon*.

In all writs of entry.

In a *quod ei deforceat*.

So, in many writs of *præcipe quod faciat*; as in a writ *de rationabilibus divisis*, customs and services, *secta ad molendinum*.

So, in *nativo habendo*, *quo jure*, writ of mesne, *quod permittat*.

So, in all actions ancestral possessory; as, *mortd' ancestor*, *aiel*, *besaiel*, *cosinage*, and *nuper obiit*.

So, in an assize of *darrein presentment*, *quare impedit juris utrum*.

In an attain; by the st. 23 H. 8. 3.

In a *warrantia chartæ*, *curia claudenda*, and partition.

So, where a stranger to the writ is to be cited *pendente lite*, process shall be against him by summons; as, upon voucher, *aide prier*, by summons *ad warrantizandum*, summons *ad auxiliandum*.

So, in personal actions for debt or contract, the original process is summons.

## (D 2.) Re-summons.

If a summons be returned *tarde*, or not returned, there shall be an *alias* summons. Off. Br. 358. 361.

Or, returned that the demandant hath not found pledges. Off. Br. 357. 361.

Or, that none came to show the land to the sheriff. Off. Br. 358, 359.

Or, that no proclamation was made according to the st. 31 El. 8. Off. Br. 357. 361.

## (D 3.) How executed.

The sheriff in person, or by his bailiff, ought to summon the tenant in person, or upon the land demanded. Fl. 6. c. 6. s. 4, 5.

In personal actions, summons shall be to the person, if he be within the county, or at his house. Fl. 6. c. 6. s. 4.

So, where the tenant has no land, whereon he may be summoned. Fl. 6. c. 6. s. 5.

In right of advowson, *quare impedit*, &c. it may be at the church.

And the sheriff may enter the land of another, to summon the tenant. (1 Brownl. 158.)

If the action be for recovery of land, it ought to be in *terrâ petitâ*.

Though he be not actually tenant of the land. Fl. 6. c. 6.

Though he has only the reversion.

So, the heir shall be summoned on the land which descends.

The sheriff ought to take two summoners, *probos et legales homines* to testify the summons. 1 Brownl. 158. 1 Mod. 248. In real actions. 2 Sho. 282.

And

And though now he does not make summons, yet it ought to be proved, if the summons be denied; for the sheriff returns the names of the summoners.

So, the summons ought to be in the day-time, before sun-setting. R. Cro. El. 42.

And fifteen days at least before the return of the writ. Co. L. 134. b.

And by the st. 31 El. 3. after summons in real action, proclamation shall be made of it on Sunday, fourteen days before the return, at or near the most usual door of the church or chapel of the town or parish where the land lies, on which the summons was made; otherwise, no *grand cape* shall go, but an *alias* or *pluries* summons.

The summons shall be at the church-door, though the church be out of the county. R. Cro. El. 472.

And it is not sufficient to say, that he proclaimed all contained in the writ; but he ought to say, that he proclaimed that he made summons on the land. R. Hob. 133.

But, if the land be in several parishes, a summons in one is sufficient. Hob. 133.

So, a proclamation at the church of one parish is sufficient. Hob. 133. Noy, 22.

So, it is sufficient that the names of the summoners are returned, without saying that the summons was made. Hob. 133.

How he shall wage his law of non-summons, vide Abatement, (H 53.)

#### (D 4.) *Grand cape*.

In all *præcipes quod reddat*, if the tenant does not appear, or is es-joined at the return of the writ, if he cannot save his default, he shall lose his land; and therefore a *grand cape* issues to take the land into the king's hand, and to summon the party to answer for his default. (Fl. 6. c. 14. s. 1. 3, 4.)

The sheriff ought to take the land into the king's hand fifteen days before the return of the writ. (Fl. 6. c. 14. s. 1.)

And he shall answer to the king for the profits of the land till judgment.

And shall return a *cepi in manus*, with the names of the viewers and summoners. (Fl. 6. c. 14. s. 3.)

But, a *supersedeas* to the *grand cape* shall be granted, *si erronee emanavit*; as, if he does not return a proclamation made according to the st. 31. El. 3., as, if he does not say, that proclamation was made after summons. R. 1 Mod. 197.

If it does not appear that any part of the land lies in the vill, at the church of which proclamation was made. 1 Mod. 197.

If the return says, proclamation was made *secundum formam statuti*, generally, without saying, that it was of a summons upon the land. R. 1 Mod. 197. Hob. 133.

The sheriff upon the *grand cape* cannot carry away any profits of the land, but only seize it generally. R. 1 Leq. 92.

#### (D 5.) *Petit cape*.

In all *præcipes quod reddat*, if there be a default at the return of the *venire facias*, a *petit cape* shall be awarded for seizing the lands and summoning the party.

The

The *petit cape* shall have fifteen days before the return.

The sheriff shall return *cepi in manus* to the *petit cape*.

But, if there be a default at the day given for battle in a writ of right, there shall be final judgment without a *petit cape*.

So, there shall be final judgment without a *petit cape* in all cases of a default after verdict.

If there be a departure in despite of the court.

So, upon a default at the *venire facias* in a *quare impedit*.

#### (D 6.) Attachment.

An attachment is awarded against a man for a contempt to the court.

As, in chancery, if a defendant does not appear upon service of a *subpoena*. Vide Chancery, (D 3, 4.)

So, it goes as an original process in an assize of *novel disseisin*, or of nuisance.

So, in many writs of *præcipe quod faciat*, if the tenant do not appear upon the summons, the process shall be continued by attachment and distress infinite.

An attachment ought to be executed by the sheriff, by taking pledges of the party for his appearance, and return of the attachment by pledges.

A.

B.

And if he does not appear afterwards, the pledges shall be amerced.

Or, by attachment of the goods of the party.

The sheriff may attach any moveable goods of the tenant or defendant himself.

So, the sheriff ought to return the certainty and value of the goods; for *per catalla ad valentiam* so much, is not sufficient. R. Cro. El. 13. Cart. 225.

And when he attaches goods, he does not return pledges.

And if the party does not appear, the goods attached are forfeited. Cro. El. 13. Semb. Cart. 225.

But a clerk cannot be attached by his goods, but only by his person, or his lands, if he has a lay-fee.

So, a layman cannot be attached by his lands, or any parcel of a freehold.

Nor, by a thing fixed to the freehold. 20 H. 7. 13. b. 21 H. 7. 26. b.

Nor, by a chattel real.

Nor, by his apparel, or horse on which he rides, if he has other goods.

So, the sheriff ought to attach only a single thing, so much as will make the defendant appear; nor divers goods, and of great value. Lut. 1457. So much as is sufficient for the debt. Cart. 225.

And if he does it, and this appears upon record, trespass lies. Lut. 1457. Otherwise, if the value be denied, or taken by protestation, whereon the plaintiff demurs; for then the value is not admitted. R. M. 4 G. 2. in the exchequer, int. Swindell and Bretnall.

#### (D 7.) *Distringas*.

A *distringas* is a process which issues, if the defendant does not appear

appear at the return of the summons, or attachment; and it is called distress infinite, because it goes till appearance.

And the grand distress, because it is many times awarded instead of the *grand cape*.

The sheriff upon a *distringas* takes all the moveable goods of the party; and the profits of the land from the *teste* of the writ, which issues are forfeited to the king, and estreated into the exchequer, if the party does not appear.

And the sheriff returns *manu capt. per A. unde exit. 20s., &c.*

If a *distringas* goes instead of a *grand* or *petit cape*, and the sheriff returns issues or *nilil*, and at the return the tenant or defendant makes default, final judgment shall be given.

The issues upon *distringas* ought to be estreated the last day of every issuable term. 1 Sal. 55.

Or, by special rule; but this shall not be done without special cause. R. 1 Sal. 55.

The issues returned upon a *distringas* ought to be reasonable, though the writ says, *per omnia terras et catalla*.

And, therefore, it is sufficient that he return the profits which may arise after the *teste*, and before the return of the writ. 27 H. 8. 3.

Or, in a personal action, so much as may be the charge of the process.

[The court may order issues to be increased on *alias* or *pluries*, at their discretion, usually five times; the former in C. B. Barnes, 418. 420, 421, 422.]

[Service of *venire facias ad resp.* by leaving it with the clerk of the defendants at their counting-house, not sufficient to obtain *distringas*, though after several ineffectual calls made for the purpose of personal service. 2 Price, 9.]

[Service of *venire facias ad resp.* served on defendant's servant at his dwelling-house during his absence abroad, not sufficient to warrant a *distringas*, nor will the court grant a rule to shew cause why such service should not be sufficient. 2 Price 12.]

[Where the defendant is gone abroad the service of the sheriff's summons granted on a writ of *venire facias ad resp.* at his last place of abode, is regular. Forrest, 29.]

[The court will not grant a *distringas* against a defendant who has not been served with process, other than by delivery of it to a person at whose house he had recently resided, unless it appear that he then lived there. 1 Price, 309.]

[Service of *venire facias* at the dwelling-house on defendant's wife, is good, and the court will thereupon grant a *distringas*. 2 Price, 4.]

[The service of a summons and execution of a *distringas* at the defendant's house who had gone abroad, leaving another in possession of it, is regular. 1 B. & P. 200.]

[A *distringas* against the defendant abroad, for a demand contracted by him during his absence, is regular. 1 Taunt. 487.]

[The court will not grant a *distringas* to compel an appearance that the defendant is out of the kingdom. 1 Mars. 292.]

[The affidavit for a *distringas* against a defendant abroad, must state that he is absent, in order to avoid process. 5 Taunt. 703.]

[In suits against privileged persons, a *testatum distringas* issued into a dif-

a different county to that in which the action is brought, and into which the original summons and *distringas* have issued, is regular. 4 East, 162.]

[Under a *distringas* to compel appearance, 4s. only can be levied the first time. 4 East, 162.]

[Rule as to the increasing and sale of issues on writs of *distringas*. C. B. Trin. 38 Geo. 3., 1 B. & P. 412.]

[Where a defendant stands out several *distringas*, the terms on which the issues will be returned, are in the discretion of the court. 1 B. & P. 81.]

[The costs of issuing writs of *distringas* under 10 Geo. 3. c. 50. are to be paid before appearance, though no issues be levied. 5 Burr. 2725.]

[Stat. 10 Geo. 3. c. 50. extends to all writs of *distringas*, as well as those issued against members of parliament, as others. 5 Burr. 2726.]

[The stat. 51 Geo. 3. c. 12. s. 2. (9 v.) does not extend to counties palatine. Quære, whether it extends to the exchequer? 5 Taunt. 69.]

[Where a defendant is abroad, a plaintiff may still (since 51 G. 3. c. 124.) issue a *distringas*, on service of the *venire facias*, for the purpose of compelling his appearance thereby, as he might have done before the act; but not for the purpose of enabling the plaintiff to enter an appearance for him, in order to proceed to final judgment as if defendant had himself appeared. 3 Price, 263. Id. 266.]

[An excessive attachment is not therefore void. 5 Taunt. 69.]

#### (D 8.) *Venire facias*.

A *venire facias* is in the nature of a summons to bring the party to answer: or, against jurors.

[*Venire facias* left at the defendant's house is good, though he is beyond sea. Bunb. 67.]

[*Venire facias* was the old process of the court of pleas in the exchequer. Ibid.]

As to a *venire facias juratores*, vide Enquest, (C 1, &c.)

#### (D 9.) Judicial process in a real action; Summons in *auxilium*, &c.

As to *petit cape*, vide ante, (D 5.)

As to summons *ad warrantizandum*, and other process against a vouchee, vide Voucher, (D 1, &c.)

As to process for trial by battle, or the grand assize, vide Battell, (A 1, 2, 3.)

As to process for trial in other actions, vide Enquest, (C 1, &c.)

As to process for execution by *habere facias seisinam*, vide Execution, (A 2.)

By *scire facias* upon a fine, or judgment, vide Fine, (E 15.)—Execution, (A 6.)

#### (E) Process in personal actions.

##### [(E 1. a.) When issuable.]

[As well a bailable as a common writ may, in suits by bill, be sued out before the cause of action accrued. Cowp. 454; 7 T. R. 4. Though it seems an action lies for a malicious arrest. 4 East, 74.]

[As

[As a *latitat*, so a *capias*, may be sued out before the cause of action. 1 B. & P. 343; 2 East, 333.]

[(E 1. b.) Joinder of parties in.]

[In bailable actions, several defendants for distinct and separate demands, cannot be joined in the same writ or in the same affidavit. *Secus*, in actions not bailable. 4 T. R. 695.]

[(E 1. c.) *Teste* of. Vide in Abatement.]

[If a *latitat* bears *teste* out of term it is void. 5 Burr. 2586. H. 1. & 14.]

[Process sued out in term, may be tested as of the preceding term. 5 Taunt. 664.]

[(E 1. d.) Where executed.]

[A bill of Middlesex cannot be served out of the county of Middlesex. 1 T. R. 187. Dougl. 384.]

[A writ, a *latitat* for instance, cannot be served in any other county, but that of the sheriff to whom it is directed; nor can any other sheriff but the one to whom it is directed, execute it. The sheriff has no jurisdiction out of his county. 4 M. & S. 412. 1 T. R. 187. 6 T. R. 74.]

[By the practice of C. B. no *capias* can be served out of the county into which it has been issued, 2 N. R. 167.; even though the same officer should issue the writs, both into that county, and into the county and jurisdiction in which the writ is actually served; as in the case of the county of Kent and the Cinque Ports. 2 Mars. 550. 7 Taunt. 233.]

[Process directed to the sheriff of Northumberland, may be served in Newcastle-upon-Tyne. 6 T. R. 235.]

[(E 1. e.) Mode of executing.]

[An inner door may be broken open in executing process at the suit of an individual after demand, and neglect to open; and semble, though it turn out that the property or person is not within. 3 B. & P. 223.]

[An officer who enters a house to attach goods under a *quare clausum fregit*, is not justified remaining therein, until the party pays him surety-money. 6 T. R. 137.]

[(E 1. f.) Service of.]

[Delivery of process, sealed up in a letter, is no service but from the time when the party to whom it is addressed happens to open it. 3 Taunt. 234.]

[An exception to the rule of C. B. for the service of process, can only be made by leave of the court; such as, that affixing the declaration in the office may be sufficient service. 1 Taunt. 433.]

[(E 1. g.) Irregularities.]

[By taking the declaration out of the office, all irregularities in the process are waived. 1 H. B. 222.]

[The proper stage for objecting to irregularities in the process, is before appearance. 1 B. & P. 250.]

[A motion to set aside proceedings for irregularity should be made as soon as the plaintiff, by taking a new step in the cause, shows that he means to proceed; therefore, when the defendant has been served with

notice of declaration, and interlocutory judgment having been signed, with notice of executing a writ of enquiry, he is too late to take advantage of a defect in the process. 1 Mars. 550. 6 Taunt. 191.]

[The omission in process of the day of appearance is an informality that may be waived by *laches*; at least, where it appears that the defendant knew what was to be done. 1 Taunt. 59.]

[A defendant may move to set aside the service of a writ for irregularity at any time before a new step is taken in the cause. 1 Mars. 403; 6 Taunt. 5.]

[If a defendant be irregularly served with process, he may apply to set aside the proceedings although the plaintiff may have entered an appearance for him, and served him with a notice of declaration, and given him a rule to plead. 1 Moore, 299.]

[Where a *capias per continuance* is tested on the same day as the original *capias*, a new original *capias* may be taken out to warrant it. 1 B. & P. 342.]

[A bill of Middlesex will not be set aside because it requires the defendant to answer in a plea of debt instead of trespass. 2 T. R. 512.]

[The court (though they will set the proceedings aside) will not quash a writ on the ground of its having been served in a wrong county. 1 Mars. 9.]

[A waiver of an irregularity in process, by appearance, does not relate back so as to bring the defendant into contempt for not appearing in time. 1 Anst. 76.]

[The *ac etiam* part of the writ will not be struck out because the affidavit to hold to bail is defective. 6 T. R. 13.]

#### (E 1. h.) Summons.

In all personal actions for debt, or upon contract, the original process is summons; as, in debt, *detinue*, covenant, &c.

So, in dower.

#### (E 2.) Attachment.

So, in trespass, and other personal actions *vi et armis*, the original process is an attachment. Vide ante, (D 6.)

[The first process on a *justices* is attachment. 5 Taunt. 69.]

#### (E 3. a.) Capias.

Vide Pleader, (2 W 3.)

As to a *capias pro fine*, and *capius utlagatum*, vide Execution, (B 1, 2.)—Pleader, (2 W 6.)—Utlagary.—Wales, (B 2.)

*Capias ad satisfaciendum*, vide Execution, (C 9, &c.)—Bail, (R 4.)

*Capias si laicus*, vide Statute Staple, (D 4.)

*Testatum capias*, vide post, (E 7.)

[A variance between the copy of the process served, and the notice subjoined, in the defendant's christian name, is fatal. 2 B. & P. 38.]

[A variance in the body of the copy of process, from the writ itself, is fatal, and subversive of the process and subsequent proceedings. 1 Price, 245.]

#### [(E 3. b.) Detainer.]

[A prisoner cannot be detained in an action on a judgment upon which, though not ordered to be discharged, he was supersedeable from delay. 1 B. & P. 361.]

[Where

[Where a defendant held to bail on a judge's order, is discharged on the ground of a material concealment in obtaining it, all detainers by third persons, founded thereon, stand good. 2 B. & P. 282.]

[A detainer may be lodged against one within the walls of a prison, on what account soever he is there.]

[(E 4. a.) Judicial process. — General rules.]

[Even admitting that a sequestration out of chancery to compel appearance binds the defendant's property from the time of awarding it, in the same manner that a *fi. fa.* at common law, bound from the *teste*; yet it loses its title to precedence from not being enforced without unnecessary delay, so as to let in a subsequent execution, and render the sheriff (at least where he has not notice of the sequestration) answerable for a return of *nulla bona* thereto. 4 East, 523; Smith, 170.]

[A sheriff may break the inner doors of a house to take under a *fi. fa.* without demand to have them opened for him. 4 Taunt. 619.]

(E 4. b.) *Levari facias*.

Judicial process in personal actions, by the common law, was by *levari facias*, or *feri facias*. Vide Execution, (C 3, 4, &c.)

A *levari facias* requires the sheriff, *quod de terris et catallis* of the defendant *levari faciat denarios*, &c. Pl. Com. 441. a.

And it is in the nature of an original; as, upon a recognizance, &c. by a clerk. Reg. 299. b. 300. F. N. B. 265. D. Vide Statute Staple, (D 3.)

Or, judicial after judgment, against any person, ecclesiastical, or lay; for it issues out of the record in the court where the record is resident, F. N. B. 265. D.

In all cases where a *levari facias* issues, the land is debtor. Skin. 619.

[An English notice must invariably be subjoined under st. 12 Geo. 1. c. 29. to serviceable process, though the demand is under 10*l*. 7 T. R. 337.]

[Rule as to the subjoining notices to writs of summons and *distringas* in actions by original quare cl. fr. C. B. Hil. 48 Geo. 3. 1 Taunt. 304. 49 Geo. 3. 1 Taunt. 505.]

[Any irregularity in or want of the English notice, in the case of serviceable process, is no ground of objection to the writ, but only to the copy. 9 East, 528. 5 Taunt. 651.]

[The notice subjoined to a common *capias*, must be for appearance on the return day, not the *quarto die post*. Rushton v. Chapman, 2 B. & P. 340. over-ruling Sumner v. Brady, 1 H. B. 630.]

[The English notice subjoined to serviceable process, must express the day of appearance in words, not figures. 1 M. & S. 119.]

[If the year only in the notice subjoined in the service of process is in figures, the service is regular. 4 M. & S. 335.]

[In the notice to appear, at the foot of the process, it is not necessary that the year should be stated in words at length. Kennington v. Anderson, 1 Marshall, 577. over-ruling Rogan v. Lee, 1 Mars. 272. 5 Taunt. 651. Williams v. Jay, K. B., decision quoted in 5 Taunt. 652. n. and abandoned by the judges of K. B. in conference with those of C. B.]

[The year in common process need not be expressed in words at length. 6 Taunt. 333.]

[Though the notice subjoined to serviceable process, require the defendant's appearance in a past year, it is good, since this cannot mislead. 1 Taunt. 420.]

[Summons and notice to appear at the return, being from Easter-day in one month, is bad. 4 Taunt. 751.]

[If the day on which a defendant is called on to appear, be omitted in the notice attached to mesne process, the court will set aside the writ, and all subsequent proceedings, notwithstanding the defendant has suffered a whole term to elapse without giving notice to the plaintiff, and does not apply to the court till after the execution of a writ of inquiry. 2 Price, 9.]

[The defendant must be named in the notice subjoined to serviceable process. 1 H. B. 100.]

[The filazer's name need not be added to a common *capias*. 1 H. B. 120.]

[The plaintiff may sue out a *que minus*, after having sued out common process for the same cause, and the court will not order the bail bond in the second process to be delivered up to be cancelled, because there was only one warrant for both processes. Wight. 79.]

#### (E 5.) *Fieri facias*.

By the common law, after judgment or a recognizance acknowledged, within the year the plaintiff might have a *feri facias*, (as well as a *levari facias*) which commands *quod de bonis et catallis fieri faciat*, &c. 3 Cro. 12. a. Vide Execution, (C 4, &c.)

So, a *feri facias* lies for damages recovered in an assise, as well as in personal actions. Reg. Ju. 18. b. 24. b.

In a *quare impedit*, or for arrearages of an annuity. Reg. Ju. 25. b. 26. b.

In a writ of ward. Reg. Ju. 43. a.

If part be levied by a *feri facias*, there may be another *feri facias* for the residue.

So, if the sheriff returns, that he is a clerk, and has no lay-fee, it may be directed to the bishop of the diocese where his benefice lies. Reg. Ju. 22. 26. b.

If he be a *beneficial*, in Hibernia, it may be to the justices of Ireland. Reg. Ju. 43. b.

If the defendant has goods in several counties, the plaintiff may have several *feri facias*'s for the whole, to each county. R. Dy. 162. b.

[If a plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain for his use, money which he has levied in an action at the suit of the defendant. Doug. 231.]

#### (E 6.) *Elegit*.

So, by the st. W. 2. 18. upon a judgment or recognizance, the plaintiff, or conusee, may have process by *elegit*, for all the goods, and a moiety of the lands of the defendant. Off. Br. 77. Co. L. 289. b. Vide Execution, (C 14.)

Though he had a *feri facias*, or other execution upon which nothing, or only part of the debt, was levied. Vide Execution (H).

But, an *elegit* after a *feri facias*, &c. ought to recite how much was levied upon it. 1 Sid. 91.

(E 7.) *Testatum capias*, or *feri facias*.

So, if a process be returned *nihil*, there may be another process of the same nature, with a *testatum* of the former writ and return to the sheriff of another county. Vide Execution (F).

If the first process requires the appearance of the defendant, the *testatum* does not issue before the *quarto die post* the day of return; for the defendant has till then to appear. 2 Jon. 200.

So, the *testatum* does not issue before an entry upon the roll, that there are goods there, &c. and this is the warrant for the writ. R. Hob. 68.

But, there may be a *testatum fieri facias* immediately after the return of the first writ; for thereby the defendant has no day in court. R. 2 Jon. 200.

So, the first writ may be returned in course by the attorney, without going to the sheriff. R. Sal. 589.

So, if judgment be given or affirmed in trinity term towards the end of the term, a *testatum capias* may issue the last day, returnable the first return of michaelmas term; for the judgment relates to the first day of the term, or it may be returnable in the same term. R. 2 Mod. Ca. 190.

[If a *testatum f. fa.* be sued out and executed, without an original *f. fa.* having issued to warrant it, it will be set aside for irregularity. 3 Term Rep. 388.]

[But such an irregularity may be cured on the production of an original *f. fa.* Id. ibid. et 658. Barnes, 211.]

[If a judgment be in one county, a *ca. sa.* cannot go into another without a *testatum* previously sued out, or awarded on the roll. 2 Bl. Rep. 694.]

For more concerning title Process, vide Accompt, (E 1.)—Admiralty, (E 18.)—Amendment, (C 1, 2.)—Assise, (B 9.—C 2.)—Attaint, (C 2.)—Audita querela, (E 1.)—Certiorari, (H 1, 2.)—Chancery, (D 1, &c.)—County, (C 9, 10.)—Courts, (P 8.)—Imprisonment, (H 1, &c.)—Information, (D 1.)—Leet, (M 10.)—Officer, (G 13.)—Parliament, (L 18.)—Pleader, (B 7, 8.—V 1, &c.—2 V 1.—2 W 2, &c.—2 X 1. 9.—2 Y 1.—3 E 1.—3 F 1.—3 I 1.—3 K 1.—3 M 2. 24.—3 N 2. 3 O 1.)—Præmunire, (C.)—Prærogative, (D 73.)—Quod permittat, (D 3.)—Quo Warranto, (C 2.)—Retorn (A).—Wales (B 1, 2.—C).

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PROCHEIN AMY.

Vide PLEADER, (2 C 1, 2.)

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PROCLAMATION.

Vide PRÆROGATIVE, (D 2, 3.)—COPYHOLD, (R 9.)

Proclamation of a Fine.

Vide FINE, (G 1, &c.)—ESTATES, (B 25.)

## PROFESSION.

**Proclamation of Rebellion.**

Vide CHANCERY, (D 4.)

**PROCTOR OF THE CLERGY.**

Vide CONVOCATION.

**PROCURATIONS.**

Vide TENTHS (C).

**PROFANATIONS.**

Vide SACRAMENTS (F).—TEMPS, (B 3.)

**PROFESSION.****(A) Profession ; what shall be.**

When a man enters into religion after a time of probation, when he takes the habit, and vows obedience, perpetual poverty and chastity, he shall be said to be professed. Co. L. 132. a.

But, of a profession made out of the kingdom, the common law does not take conusance ; and therefore, if he be professed in Normandy, he may maintain an action in England ; for the profession cannot be tried. Co. L. 132. b.

So, a wife or an husband, cannot be professed without the consent of the husband or wife. Ibid.

**(B) The effect of a profession.**

A man professed in religion is dead in law, and his son shall inherit to him. Lit. s. 200.

And he may have an assise of *mort d'ancestor*. Co. L. 132. a.

So, if he be tenant in chivalry, his heir shall be in ward. Co. L. 132. b.

Warranty shall descend. Ibid.

If he be a joint tenant, the land survives. Ibid.

But, profession does not avoid his own grant ; as, if tenant in tail makes a discontinuance, the issue shall not have a *formedon* during his natural life. Ibid.

So, the wife of a man professed shall not be endowed : for profession is made with the consent of the wife. Co. L. 132. b.

So, profession shall not do wrong to a stranger ; and therefore, a descent upon a civil death does not take away entry. Ibid.

By the st. 31 H. 8. 6. 33 H. 8. 29. and 5 & 6 Ed. 6. 13. all persons professed were made able to purchase, sue, &c.

So, the canon law being abolished, which made the disability, the common law takes no notice of him. R. Sal. 162.

Vide

Vide Abatement, (E 5.—F 1.—H 41.)—Capacity, (D 1.)—Ecclesiastical Persons, (B 2.)

## PROFITS CASUAL.

Vide PRÆROGATIVE, (49, 50.)

## PROHIBITION.

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  - (A 3.) To restrain a nuisance. p. 138.
- (B) By what court. p. 138.
- (C) The nature of a prohibition. p. 139.
- (D) At what time granted. p. 140.
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**(A) To what court it shall be.**

**(A 1.) To the temporal court.**

If courts exceed their jurisdiction, a prohibition may be granted to them.

And this to temporal as well as spiritual courts. F. N. B. 39 H.

As if a court-baron, county-court, &c. or other inferior court in a city, borough, &c. hold plea of a matter out of the limits of their jurisdiction, a prohibition may be granted. F. N. B. 45. F. 46. A. B. 2 Rol. 317. l. 25. 30. Vide Courts, (P 15.)

So, if the cause does not appear to be within their jurisdiction. 2 Rol. 317. l. 40.

Or if a single cause of action be divided into several by covin, to give them jurisdiction. 2 Rol. 281. l. 27. 317. l. 25.

So, if an action in an inferior court be founded upon a judgment in B. R. or C. B. 1 Rol. 54.

So, if in such court a foreign matter happens, which cannot be there determined, a prohibition goes to surcease, till it be determined; as in right patent in the lord's court, if the tenant join the mise, by battle, vouch a foreigner, &c. F. N. B. 39 H. 40. A. B. C.

To the Cinque Ports, if they confound law and equity together. 1 Sid. 355.

Or, proceed for the cause of a suit well commenced at law. Hard. 475.

So, a prohibition lies to the duchy courts, and courts of a county palatine, if they hold plea of lands out of the duchy. R. 2 Rol. 317. l. 55. Hob. 77. 1 Rol. 42. 71. Vide Franchises, (D 1, &c.)

So, to the chancery of Chester, &c. if it holds plea of a matter not cognizable there. R. 2 Rol. 318. l. 10. R. 1 Sid. 189. 309. Mo. 916. Cont. 1 Rol. 246. 331. R. acc. 1 Rol. 252.

Or, if the chancery there grants an injunction where it ought not. R. 2 Rol. 318. l. 15.

But, not to the chancery here. Vide Ray. 227. Sho. P. C. 63. Lord Raym. 531.

So, to the sub-warden of the court of stannaries, if he, as chancellor, directs things pending in the courts of the duchy of Cornwall. 2 Rol. 314. l. 20.

If the court of stannaries holds plea where it does not relate to tin, and no party is a tinner. 2 Rol. 253. 379.

So, to the court of the council of York. 2 Rol. 316. H. Mo. 874. Pal. 527.

To the court of the marches of Wales. Ray. 191. 1 Rol. 33. 190. 263. 2 Rol. 308. 327.

[To the grand session of Wales, if process is served out of the jurisdiction. Str. 630. 2 Lord Raym. 1408.]

To the court of honour of the earl marshal, if it holds plea of things determinable by the common law. R. Ca. Parl. 61. 67. Sal. 553. 4 Mod. 128. Sho. 353. Vide 1 Sid. 352.

To the courts of London, if they proceed when their jurisdiction is determined. Sal. 425. 4 Mod. 151. Skin. 600.

To

To the court of marshalsea, if it holds plea in debt upon a judgment in B. R. Sal. 439.

To the court of requests. 2 Cro. 535. Godb. 216. 1 Rol. 263. 2 Rol. 96. 103.

To the commissioners of appeals for the excise. 5 Mod. 271.

To the court of exchequer, if it grants an attachment for a proceeding in B. R. Dub. Sal. 550. D. 1 Rol. 252.

To a court by usurpation, without lawful authority. Sal. 553.

As, if it usurps visitatorial authority. Reg. 40, 41. Vide post. (F 11.)

[Naval courts martial, military courts martial, courts of admiralty, and courts of prize, are all subject to a prohibition from the courts of Westminster-Hall. 2 H. Bl. 100.]

[But the court will not grant a prohibition to prevent the execution of a sentence of a military court martial passed against A. who had received pay as a soldier, though the proceedings of the court martial appear in some instances to be erroneous. Ibid. p. 69. Vide supra, Admiralty, (G).]

#### (A 2.) To the spiritual court.

So, in the time of H. 3. and ever since, prohibitions have been granted to the spiritual court, if it holds plea of a matter, whereof coarousance there is not allowed. 5 Co. *de Jure Eccl.* 11. [3 T. R. 3.]

In the time of Ed. 1. a prohibition was granted to a bishop and his official, and an attachment for holding plea after prohibition. 2 Rol. 281. A.

So, if any claims spiritual jurisdiction, when he has it not, a prohibition lies. 2 Rol. 313. l. 42. Vide post, (F 11.)

As, if a collector of the pope holds a plea of spiritual things. 2 Rol. 281. l. 23. 313. l. 35.

If any one purchases a citation from the pope to appear before the archbishop. F. N. B. 44. J.

Or, has a citation to a court out of the realm, a prohibition goes to prevent his answering. F. N. B. 44. H.

If the archbishop of Canterbury claims a concurrent jurisdiction with any bishop of his province; for he cannot have it but as *legatus natus*; which title was abolished with the pope. R. 2 Rol. 313. l. 45. Hob. 17.

When it lies to the court of admiralty, vide Admiralty, (F 2, &c.)

#### (A 3.) To restrain a nuisance.

So, a prohibition lies to restrain a public nuisance. Semb. Skin. 625, 626. Vide Action upon the case for a Nuisance, (D 4.)

#### (B) By what court.

By Rot. Parl. 18 Ed. 1. The chancellor and chief justice have power to determine what pleas ought to be prohibited in causes ecclesiastical. 2 Rol. 316. H.

And

And therefore a prohibition to the spiritual court may be granted by the chancery. F. N. B. 40. N.

So, C. B. may grant a prohibition. 2 Rol. 317. l. 5. 10. R. 12. Co. 59.

And the exchequer. Adm. Ca. Parl. 58. R. Pal. 526.

Though no plea be depending there of such matter. 2 Rol. 317. l. 5.

So, the courts of law in Chester may grant a prohibition to the spiritual court there, if it exceeds its jurisdiction. 2 Rol. 318. l. 25.

So, the court of great sessions in Wales, to the spiritual court there, R. 1 Sid. 92., but the reporter makes a *qu.*?

So, B. R. or C. B. may grant a prohibition to the spiritual court in Chester, Lancaster, &c. though the courts there may do it. Cont. 2 Rol. 318. l. 20. Acc. *ibid.* l. 25. 317. l. 10.

So, to the court of marches in Wales, if it holds plea of a spiritual matter of which it has not consance, though the superior court cannot do right. R. 2 Rol. 313. l. 15.

So, to a spiritual court, which holds plea of tythes in London; though by the st. 37 H. 8. 12. the jurisdiction in such case is given to the mayor of London. R. 2 Rol. 313. l. 25. 2 Inst. 659, 660.

Or, if a suit be there by an orphan for a legacy, goods, &c. the consance whereof, by custom, belongs to the mayor and aldermen of London. R. 5 Co. 73. b. 2 Rol. 313. l. 10.

Or, against an executor or administrator, for goods which belong to orphans. 2 Rol. 313. l. 20.

Or, if a suit be for probate of a will, where the probate belongs to the lord of a manor. Per Poph. 5 Co. 73. b. 2 Rol. 313. l. 5.

So, a prohibition may be granted by B. R. to the council of York; if they hold plea; of a matter within the jurisdiction of Durham. R. 2 Rol. 314. l. 15.

So, if C. B. holds plea of lands held of a subject, the lord of the manor may have a prohibition to the justices of C. B. commanding them to surcease, and that the demandant sue a writ of right of patent in his court. F. N. B. 8. B. 39. H.

### (C) *The nature of a prohibition.*

[In prohibition, are, 1st, contempt of the crown; and, 2dly, a damage to the party. A suit for it must be brought in a temporal court, and the party prays a prohibition; and whether defendant proceeded or not after the prohibition, and attachment goes to bring him into court. If he has proceeded after the writ delivered, it is a contempt; but still it is a matter examinable, whether the court have jurisdiction or not. If it have not, the court will prohibit finally, and give satisfaction. The party is not to have damages, if they have jurisdiction; but if they have none, they have acted against the prohibition of law, and done the party wrong. Fort. 345.]

A prohibition ought to be granted *ex debito justitiæ*. 1 Sid. 65. Per two J. Hide cont. Ray. 92. Per all the J. 3 Jac. 2 Inst. 607. Per Keeling, Hide cont. 1 Sid. 178.

And being intended for keeping every court within its proper jurisdiction,

jurisdiction, the law, as to prohibitions, cannot be changed but by act of parliament. R. 2 Inst. 601.

So, the form of a prohibition cannot be altered but by parliament. 2 Inst. 601, 602.

#### (D) At what time granted.

Where it appears by the libel that the matter was not within the jurisdiction of the spiritual court, a prohibition lies after sentence, or before. 2 Inst. 602. 619. 2 Rol. 318. l. 45. Sal. 548. [2 Burr. 813.] Cowp. 424. 3 Term Rep. 3.]

So, to a temporal court, it lies after judgment, where the matter appears to be out of the jurisdiction. 2 Inst. 602. 619.

Or, after execution. Ibid.

So, after sentence and appeal. 2 Rol. 318. l. 48. 319. l. 20. Agreed, 1 Sid. 65.

[A prohibition was granted on a libel to charge a man to the repair of the church in respect of a light-house, after sentence, and an appeal to the delegates. Bunb. 81.]

After an appeal to the arches, and then to the delegates, and sentence affirmed there. R. 2 Rol. 24.

[To a court of appeal, where it appears they have no jurisdiction over the subject, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for the prohibition be the appellant. 1 Term Rep. 552.]

So, a prohibition lies after sentence, if the libel be for a thing within their jurisdiction, and a temporal matter becomes incident, and they refuse such proof as the temporal courts allow; as proof by a single witness. R. Cro. El. 666. Mo. 907. R. Sho. 173. 161. 3 Mod. 286. Sal. 547.

[But where the spiritual court has jurisdiction, or unless the want of jurisdiction appear on the face of the proceedings, and has pronounced sentence, there shall be no prohibition; the remedy being by appeal. 2 Bur. 813. Doug. 378.]

[If the spiritual court has cognizance of part of the charge only, and not of the rest, the court, after sentence below, will not grant a prohibition. 2 Term Rep. 473.]

[If in a suit for a prestation, defendant pleads there is no prescription, and that is denied; yet there shall be no prohibition till they join issue on the plea, and it appears the prescriptive right will come in question. Str. 897.]

So, it lies after an appeal, if a thing be litigated upon the appeal, which upon a prohibition was determined by verdict, and then a consultation awarded. R. 2 Sho. 195.

But generally after an appeal, a prohibition shall not be allowed if the matter be not apparent; for by that the party affirms the jurisdiction. 2 Rol. 319. l. 10.

And if by appeal he may have relief, a prohibition shall not be granted. 1 Rol. 319. l. 30.

So, after sentence, a prohibition does not go upon suggestion of a matter which does not appear by the libel. 2 Rol. 318. l. 45. Godb. 164.

As,

As, if a libel be for non-payment of a rate for reparation of a church, a prohibition shall not go, upon a suggestion that foreign disbursements, as for prisoners, &c. are included in the rate. R. Lut. 1022.

If a libel be for defamation in calling whore, upon suggestion that the words were spoken in London. R. (Reported in Bunbury's Reports, 312.) R. 9 Geo. 1. 2 Mod. Ca. 176.

If a libel be in the admiralty, after sentence a prohibition shall not go, upon suggestion that the contract was upon land, if it does not appear by the libel. R. 2. Mod. Ca. 194. Vide Admiralty, (F 9.)

[Before sentence, prohibition issues on a suggestion of matter of fact not appearing on the face of the proceedings below; after sentence it cannot be overturned by bare averment of the fact; but if want of jurisdiction appears on the face of the libel, or on the proceedings, it shall issue after sentence. 2 T. H. 564.]

[After sentence that the new churchwardens make a rate to reimburse the former. B. R. H. 381.]

So, a prohibition does not go to a temporal court after judgment, where it appears upon evidence at the trial, that the cause of action arose out of the jurisdiction. R. 2 Lev. 220., but *qu.* if the party demurred to the evidence, and the demurrer was refused?

Nor, to the admiralty. 1 Sid. 331, 332.

So, a prohibition does not go upon the st. 23 H. 8, for suing out of his diocese after answer and sentence thereon; for the party acknowledged the jurisdiction. R. 2 Rol. 318. l. 40. Adm. P. 1 W. & M. inter Tiler and Mantle, Sal. 548. Vide post. (F 9.)

*A fortiori*, not after excommunication, and a writ of *excommunicatio capiendo*. R. 12 Co. 77.

So, a prohibition shall not go after a suit is entirely determined; for there is not any to whom it may be directed. Per cur. 1 Sid. 166.

[Therefore, though where matters are essentially triable at common law, if the party come before sentence, the court will grant it for the sake of the trial; yet, if he submit to the trial, he is afterwards too late. Cowp. 424.]

[Therefore, where the plaintiff has grounded his libel on a custom, and it is found against him, he shall not have a prohibition. Id. *ibid.*]

So, if a prohibition be granted; and afterwards sentence and an appeal pass, it cannot then be used. R. 2 Cro. 429. Vide post. (K 1.)

So, a prohibition does not go after a writ of *excommunicatio capiendo* against the defendant, though the cause appears to be out of the jurisdiction, or is pardoned; for the king's writ shall not be discharged by the prohibition, nor the party delivered by it. R. 12 Co. 76.

### (E) At whose instance.

So, where the court has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as the defendant himself. 2 Inst. 607.

So,

So, upon motion of the plaintiff himself, who exhibited the libel. 2 Inst. 602. 607. R. 2 Rol. 312. l. 10. Mo. 780.

[But if a wife libel to recover her fame, prohibition shall not be granted on the husband's motion. Str. 576.]

So, a prohibition may be sued by him in the reversion, if a libel be for tythes against his lessee. Cro. El. 55. Mo. 915.

### (F 1.) For what cause granted.

A prohibition shall be granted to the spiritual court in all cases where the ecclesiastical judge proceeds in a matter out of their jurisdiction.

Though the temporal court has not cognizance of the matter for which the libel is in the spiritual court; for it is a sufficient cause for a prohibition, that the ecclesiastical court exceeds its jurisdiction. Godb. 246, 247. Vide ante, (A 24.)—Post. (F 11.)

[So, if a churchwarden has had his accounts allowed in vestry. Bunb. 247. 289. Str. 974.]

[The spiritual court may compel the churchwardens to deliver in their accounts; but they cannot decide on them. 3 Term Rep. 3.]

### (F 2.) If freehold be concerned : — As a title to lands or tenements.

In the time of Ed. 1. It was enacted, that consuance of pleas *de feodalibus, libertatibus feodaliis, maneriis, advocacionibus ecclesiarum, recognitionibus laicis feodum concernentibus*, belong to the king's courts, and ought not to be sued before the ecclesiastical judge. 2 Inst. 600.

And if they are, a prohibition lies. F. N. B. 40. l.

As, if a suit be in the spiritual court *de castris, villis, maneriis, &c.* 2 Rol. 282. l. 20.

So, if a suit be in the spiritual court for inclosing his land next to the church-yard. Vide post. (G 3.)

[If the bounds of a church-yard come in question. Str. 1013.]

For a way to the church. Vide post. (G 3.)

For the making an entertainment for the parishioners at his house in their perambulation. Vide post. (G 3.)

For a seat to which he has title by prescription. Vide post. (G 3.)

[If one sued for disturbing a person in his seat at church suggests, that he purchased an ancient house with this seat belonging to it, to him and his heirs. Wils. 17.]

[If there are reciprocal prescriptions to a seat in a church; for they they adjudge one to be good. 1 B. M. 314.]

[If one has a prescription to have a seat in a church, and the seats are pulled down without his consent, and new ones built by the ordinary on part of the place where the old one was; though he have as much seat as he had before, only not in the same place, it is illegal; and if spiritual court interpose, prohibition lies. Fort. 346.]

[So,

[So, where the right of election to the office of canon residentiary, a freehold office, is in the dean and chapter, a prohibition shall go to the bishop claiming a right to present by lapse, under pretence of his visitatorial authority. 1 Term Rep. 650.]

(F 3.) To an advowson or church.

So, if a suit be in the spiritual court concerning the right to an advowson, a prohibition goes.

Or, concerning the right to a presentation. R. 1 Rol. 178.

So, after induction, whereby the church is full at common law, a prohibition shall be granted, if a suit be in the spiritual court, upon pretence that the institution was not good; for by consequence the right to the church will be determined by the spiritual law, and all *quare impedit* ousted. R. 2 Rol. 282. l. 30. 294. l. 10. Hob. 15. 1 Sid. 293. R. Mo. 861.

Though a *quare impedit* be depending at the same time. R. 2 Rol. 294. l. 5.

Though institution was granted after a *caveat* entered, which does not vitiate the institution, except by the spiritual law. R. 2 Rol. 282. l. 40. 1 Rol. 228.

Or, after a *duplex querela* commenced in the spiritual court by the other party. R. Mo. 879.

So, if a suit be in the spiritual court for depriving a clerk, because the institution was not good; for the church will be avoided by it. R. 2 Rol. 282. l. 45.

Or, to repeal an institution and induction, because he was presented by simony. R. 2 Rol. 292. l. 25.

So, if a presentee to a second benefice without a dispensation, *ex auctoritate cantuariensis* obtains a presentation from the king, and the bishop takes time to be advised concerning the institution, pending which B. procures a presentation from the king, and institution and induction upon it; a prohibition shall go, if a suit be against the bishop for his injustice; for this tries the right to the church. R. 2 Rol. 293. l. 10.

So, if B. be sued for obtaining institution and induction after another was inducted. R. 2 Rol. 293. l. 5.

So, if a patron presents after a recovery in a *quare impedit*, and an inhibition is granted by the spiritual court to stay institution; a prohibition goes. R. 2 Rol. 294. l. 25. 28. 31.

So, after recovery in a *quare impedit*, if the patron presents, and institution is made, and then upon a *caveat* an inhibition is granted by the spiritual court to the archdeacon not to induct, a prohibition shall go; otherwise all trials by *quare impedit* are ousted. R. 2 Rol. 294. l. 15.

So, if a suit be in the spiritual court to repeal a super-institution made after a recovery in a *quare impedit*, and before removal of the incumbent by a writ to the bishop. R. 2 Rol. 292. l. 45. 1 Rol. 62.

Or, after induction upon a second institution. R. 2 Lev. 125.

So, if institution is delayed for two months, (for which only one month is allowed by the canon,) upon which a *duplex querela* is sued by the patron

patron to prevent a presentation by lapse, and yet the bishop after six months presents by lapse, a prohibition goes. 2 Rol. 294. l. 35.

(F 4.) To an office.

So, by the st. Ed. 1. entitled *prohibitio formata de statuto articulorum cleri (incerti temporis)* (Rast. Abr. Prohib. 8.), consuance of pleas of offices, &c. belong to the king's courts, and ought not to be drawn before a spiritual judge. 2 Inst. 600. Vide post. (G 4.)

And therefore if a suit be in the spiritual court for an office which concerns a spiritual matter, a prohibition goes, for the office is temporal, and the party has a freehold; as, for the office of register of a bishop. 2 Rol. 285. l. 45. 2 Rol. 306.

Though the suit be upon a supposition, that a prior grantee had forfeited his office for recusancy; for the freehold will come in debate. R. 2 Rol. 285. l. 35.

So, if a suit be in the spiritual court for the office of chancellor. R. 2 Rol. 285. l. 50.

Or, to deprive him; for his patent will be thereby avoided. Semb. 4 Mod. 27.

Though the deprivation be for his ignorance of the canon law, of which the spiritual court is the proper judge. R. cont. 2 Rol. 286. l. 2. Cro. Car. 65. Latch, 228. Semb. acc. 4 Mod. 27.

So, if the suit be for the office of a commissary made by the lessee of a prebend. R. Ray. 88.

So, if the ordinary proceeds to deprive the master of a school, who has a fixed allowance, without cause, a prohibition goes. R. 2 Rol. 283. l. 5.

Or, to deprive the parish-clerk, chosen by the parishioners; for it is a lay-office. R. Godb. 163.

Or, though chosen by the parson. Dub. F. g. 273. if the cause for deprivation be an offence determinable by the common law, before conviction there. Semb. F. g. 190.

[If parish clerk is deprived, another appointed, and the old one libels the new, prohibition lies. 1 B. M. 367.]

[If one is sued for executing the office of deputy parish-clerk, without licence of the ordinary. Str. 942.]

But the spiritual court shall proceed against an officer in the ecclesiastical court, for an offence contrary to the duty of his office, though deprivation may ensue. Semb. F. g. 190.

(F 5.) If chattels or debts are concerned.

So, by the st. Ed. 1. intitled *Prohibitio*, &c. (Rast. Abr. Prohib. 8.) consuance *de rebus et causis pecuniarum, et aliis debitis et catallis, que non sunt de testamento aut matrimonio*, belong to the temporal court, and shall not be drawn before a spiritual judge. 2 Inst. 600. 2 Rol. 218. N.

And if they are drawn before the spiritual court, a prohibition lies. F. N. B. 40. H.

And therefore, if a suit be there for any goods or chattels, though they belong to the church, a prohibition lies; as, if a suit be for ornaments, or goods given to the church. 2 Inst. 492.

For

For a bible, service-book, chalice. 2 Inst. 492. 1 Rol. 255.

For an image taken out of a church. 2 Inst. 492.

For a pope's bull, or other charters or writings granted to a church. 2 Inst. 492.

So, if a suit be there for the profits of a benefice taken (unless it be by sequestration, or authority of the spiritual court). R. 2 Rol. 293. l. 20.

For trees cut down in the church-yard. 2 Rol. 311. l. 27. Cont. Godb. 259. Acc. if the suit be for damages. 1 Rol. 255.

For bells taken out of a church; for the property is in the church-wardens, who may have trover. R. Sal. 547.

Or, for organs taken out of a church. R. Rol. 57.

[So, the court of B. R. granted a prohibition to stay a suit in the spiritual court for breaking open a chest in the church, and taking away the title-deeds to the advowson, because only an action of trespass or trover could be maintained in the temporal courts for the recovery thereof. 4 T. R. 351.]

So, if it be for detaining goods of an intestate, whereby he cannot exhibit a full inventory; upon which the defendant pleads property. R. 4 Leo. 150.

So, if a suit be for a thing for which damages are recoverable at common law; as, upon a promise to pay such a sum.

Though it be to be paid when his daughter shall marry. F. N. B. 44. A.

If a suit be for tythes severed, which a stranger afterwards carried away. Cro. El. 607.

So, if a suit be for proctor's fees, or those of a parish-clerk; for it is a temporal duty, for which a *quantum meruit* lies. 5 Mod. 238. 1 Sal. 333. R. 1 Mod. 167. Skin. 589. [Doug. 629. (607.) Bunb. 170. 2 Str. 1108.]

So, if it be for register's fees; for the spiritual court cannot establish a fee. R. 1 Sal. 333. 4 Mod. 254.

[An apparitor cannot sue in the spiritual court for his fees. Doug. 629.]

So, if a suit be for debt, or upon a bond in the spiritual court, a prohibition lies. F. N. B. 40. H.

Though the party acknowledges himself indebted, or makes a promise to pay in the spiritual court. F. N. B. 41. B. C. E.

Or, the debt was recovered there, and the plaintiff sues to have execution. F. N. B. 41. D.

Or, the bond was given to perform a sentence there. 2 Rol. 302. l. 15.

So, if a libel be founded upon a covenant to pay tythes. Semb. 1 Leo. 10.

So, if a sentence be in the spiritual court, and costs, and afterwards a prohibition is granted; and upon debate a consultation, and then the spiritual court gives costs *de novo* for the delay by the prohibition; for those costs *de novo* a prohibition goes. R. 2 Rol. 119.

But, for a legacy or marriage-portion, suit may be in the spiritual court. Vide post, (G 15. 17.)

So; for costs recovered there. F. N. B. 52. D. M.

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So,

So, for procurations, synodals, &c. though a prescription is denied; for they are due *de jure*. Ray. 360.

So, if bond be given in the spiritual court for a matter testamentary, or matrimonial. F. N. B. 41. Per Dod. 2 Rol. 160. Vide post, (G 15, 16, &c.)

So, for the profits of a benefice taken in time of sequestration. 2 Rol. 293. l. 23.

So, if covenant, &c. be mentioned only as incident; but the libel is founded upon an endowment, &c. a prohibition does not lie. R. 1 Leo. 10.

(F 6.) If the suit be for a criminal matter.

So, by the st. Ed. 1. intituled *Prohibitio*, &c. (Rast. Abr. Proh. 8.) consuance of pleas of felons, malefactors arraigned, robbers, belongs to the king's court, and shall not be drawn before a spiritual judge. 2 Inst. 600.

So, if a suit be there for perjury in a temporal cause. 22 Ed. 4. 20. Bro. Jurisdiction, 20.

If a suit be *ex officio*, which requires an answer upon oath to a criminal matter. 1 Sid. 374.

So, if there be an indictment for an assault with intent to ravish, if a suit be afterwards in the spiritual court for solicitation of chastity, a prohibition shall go. R. Sal. 552. [Ld. R. 809.]

But, the spiritual court has jurisdiction for punishment of a crime committed in the spiritual court, and in a cause within their consuance; as, perjury in the spiritual court in a cause of matrimony. 1 Sal. 134. Semb. 1 Sid. 217. Vide post, (G 13.)

Forgery of orders. 1 Sal. 134. When a suit is there for deprivation. R. 1 Lev. 138. 1 Sid. 217.

Extortion in an officer of the spiritual court. 1 Sal. 134.

So, the spiritual court shall proceed for the punishment of adultery, though an action for assault and battery be against the defendant for the same fact. Sal. 552. [Ld. R. 809.]

(F 7.) Or, a matter *contra pacem*.

So, by the st. Ed. 1. intituled *Prohibitio*, &c. (Rast. Abr. Proh. 8.) consuance of pleas of distresses, executions, attachments, *vi laciá*, arrests, assises, juries, secular customs, belong to the king's court, and shall not be drawn before a spiritual judge. 2 Inst. 600.

And therefore if a suit be in the spiritual court for trespass, a prohibition lies. F. N. B. 40. M. 43. G.

Though it be for entry into an house, to the intent to commit adultery. R. 2 Inst. 606, 607.

For cutting down trees in the church-yard. 2 Rol. 311. l. 27.

If an archbishop proceeds against a bishop for imprisoning another in a temporal cause. Cro. El. 484.

So, if a suit be in the spiritual court for night-walking. 2 Inst. 606, 607.

(F 8.) If a remedy be given by statute.

So, if remedy be given in any case by statute, in a temporal court, a prohibition lies to the spiritual court, if a suit be there. Co. L. 96. b. Though

Though the matter be of a spiritual nature ; except where the jurisdiction of the spiritual court is saved by the same statute. Ibid.

As, if a suit be in the spiritual court for a legacy devised out of lands ; for land is not devisable by the st. 32 H. 8. Vide post, (G 17.)

So, if a suit be against A. for dilapidations, who claims to be incumbent by the st. 12 Car. 2. 17. Semb. 1 Sid. 100.

[Preaching without licence is within the act of uniformity, and therefore prohibition lies to suit in the spiritual court for it. Fort. 345.]

[A prohibition lies to a suit for marrying without banns or licence, since the st. 25 G. 2. c. 33. s. 8. by which it is made felony. 2 Wils. 79.]

[But prohibition does not lie in a suit in the ecclesiastical court against a quaker for repairs of the church, on st. 7 & 8 W. 3. c. 34. though the act gives a remedy before justices of peace ; for the old remedy is not taken away ; so in the case of small tythes, per stat. 7 & 8 W. 3. c. 6. Fort. 347.]

(F 9.) If a man be cited out of his diocese.

So, by the st. 23 H. 8. 9. no person shall be cited out of the diocese, or peculiar where he dwells, unless it be for an offence done by a spiritual judge, or upon appeal ; or where the immediate ordinary dare not, or will not convene the party ; or be himself, directly or indirectly, party to the matter of the suit ; or, by request, (in cases where the civil or canon law allows such request,) intreat his superior to examine or determine the matter, on pain of paying double damages and costs for the vexation, and 10*l.* for every person so cited, &c.

Provided, an archbishop may cite out of the diocese for heresy, if the ordinary consent, or do not his duty.

Provided also, an archbishop may cite any out of his diocese for probate of a testament.

And, therefore, any one cited out of his diocese, may have a prohibition before appearance to the suit as well as an action for double damages, &c. Dub. 2 Cro. 321. Adm. Cro. Car. 97.

So, if a man be cited out of a peculiar where he dwells, before the bishop, he shall have a prohibition. R. Cro. Car. 162. Cont. per three J. 1 Rol. 136.

Though the court, to which he is cited, be nearer than the court of the place where he dwells. Pal. 488.

So, a prohibition lies, where an archbishop claims a concurrent jurisdiction with a bishop, in his province or see, in the diocese of such bishop, and there cites persons in the same diocese, and will not absolve till he procures the cause to be transmitted to his court ; for by such means the statute will be eluded. R. 2 Rol. 313. 1. 45. Hob. 17.

So, if a cause be transmitted to a superior, who is not the immediate superior ; for where transmission is allowed, it ought to be to the immediate superior, and not *per saltum*. R. Hob. 16. R. 1 Sid. 90.

So, if he be cited at the suit of the bishop, or archbishop himself. 2 Sho. 146.

So, if a suit be in the arches, when the defendant dwells in the diocese of London, out of the thirteen parishes which belong to the archbishop ; though it be as near. R. Hard. 380.

But if a man resides in the diocese of W., and has lands in his occupation in the diocese of P., he may be cited to the consistory court of the bishop of P. for not paying a rate to the church where his land lies; for he is an inhabitant there. R. 1 Sal. 164.

So, if tythes are due for land in the diocese of P., and the party removes to the diocese of W. and there lives seven years, he may afterwards be cited to the diocese of P. Dub. 5 Mod. 451. R. Sal. 549. Carth. 477.

So, if a man usually resides out of the diocese, but was in the diocese for trade, &c. and then there cited, it will be good, and no prohibition goes, though he afterwards returns to his habitation. Hard. 421.

So, if a man be cited to a peculiar, where he lives, though it be out of the diocese. 1 Rol. 328. Semb. Skin. 233.

So, if a suit be for a legacy in the prerogative court, when the testament was proved there, though the executor lives in another diocese. F. G. 110.

So, if a man, cited to the spiritual court in his diocese, dies *pendente lite*, the executor or administrator may be cited, though he dwells in another diocese; for the suit does not abate by the death of the defendant. R. 2 Cro. 483.

So, if a suit be against executors, and one of them lives within the diocese, though the other is out of it. 1 Rol. 328.

So, a prohibition does not lie, if a man in the diocese of London be cited to the arches; for there is an antient composition between the archbishop and bishop of London for such purpose. R. Cro. Car. 339. Dub. Ray. 91. Semb. Godb. 191.

Or, if a man within an archdeaconry be sued before the bishop, where the archdeacon, by composition, has a peculiar jurisdiction. 2 Rol. 357. 446. 448.

So, a prohibition does not lie where a cause is transmitted, upon the request of the inferior judge, to his immediate superior; for to the prohibition such transmission may be pleaded. Cro. Car. 162.

And it is sufficient to show that it was an ecclesiastical cause, without saying what cause in particular. R. Cro. Car. 162.

That it was removed upon request, without saying, that the request was under seal. Ibid.

And it is sufficient, that the cause be transmitted to the immediate superior, though the bishop be passed by; as, if a peculiar belongs to the archbishop, there may be a transmission of a cause to the archbishop, omitting the bishop. 1 Sid. 90. R. inter Johnson and Lee, 9 W. 3. 5 Mod. 238.; but no judgment there, though it seems that it was afterwards given. Skin. 589.

So, it is sufficient to show a request of the bishop, upon motion, without pleading. R. 1 Lev. 225.

But if the transmission be not to the immediate superior, it is not allowable. 1 Brownl. 46.

So, a prohibition does not lie for a citation out of his diocese, after submission to the jurisdiction of the court to which he was cited; as, if such court has proceeded to sentence. R. Cro. Car. 27. R. 1 Vent. 61. 2 Sho. 155. Vide ante, (D).

Or, if the defendant has pleaded to the libel. R. Carth. 33.

Though

Though the suit be in the diocese of London, and it appears by the libel that the defendant dwells at Winchester, which is known to be in another diocese; for the court has not judicial notice of the limits of dioceses. Carth. 34.

Yet, if upon the libel itself it appears that the defendant dwells out of the diocese, or be in any other respect out of the jurisdiction of the ecclesiastical court, a prohibition shall go. Carth. 33.

So, a prohibition did not lie for a citation out of the diocese to the high commission, which was erected by the st. 1 El. after 28 H. 8. 1 Rol. 174.

(F 10.) If a remedy be given by the common law.

So, a prohibition lies, if a suit be in the spiritual court, for a matter for which there is remedy by the common law. Co. L. 96. b.

As, for a fact, for which trespass lies at common law. Vide ante, (F 5.)

[If executor libels for taking a thing without his consent, which defendant pretends was *donatio causa mortis*; for it may be tried by action of trover. Str. 777.]

[Prohibition lies to the spiritual court to stay proceedings for calling a woman a "whore," in London. 4 Bur. 2418. 4 Bur. 2032.]

[The remedy for breaking open a chest in the church, and taking away the title-deeds to the advowson, is in the temporal, not the spiritual court. 4 T. R. 351.]

(F 11.) If the spiritual court has not jurisdiction, though there be no remedy elsewhere.

So, a prohibition lies, where the spiritual court has no jurisdiction; as, to a suit before the pope's collector *pro lesione fidei*; for the pope's collector has no jurisdiction in this realm. Bro. Jurisdiction, 20.

If a bishop, &c. acts as visitor, where he has no visitatorial power. Reg. 40, 41. Sal. 553. Vide ante, (A 2.)

If a court of judicature, erected after the fire in London, act after their authority is determined. 4 Mod. 151. Sal. 425.

(F 12.) If the spiritual court allows a custom, &c. void by law.

So, a prohibition lies, if a suit be in the spiritual court for a thing not allowed by law; as, if a suit there be founded upon a custom void in law; as, upon a custom, that the inhabitants of such a house ought to find eating and drinking for the parson and churchwardens going in procession in the rogation. R. Mo. 916. 1 Rol. 259.

So, if a suit be there for tythes of things, for which none are due by law. Vide post, (G 8, &c.)

So, if a suit be for a thing allowed by the civil law, which is not lawful by the common law; for this shall be preferred. Sti. 10.

So, if a suit be for a legacy, when, upon a legal construction of the will, none is due. 2 Rol. 414.

[On a libel in the court of dean and chapter, a peculiar, against A. for preaching without their licence, the power to licence is personal to the bishop or archbishop, not to the ordinary. Fort. 345.]

[In a suit by the next of kin, for a distribution of surplus, there being a legacy to the executor. Str. 865.]

[If the administrator of an executor is sued for a legacy given by testator. B. R. H. 185.]

[Custom to pay a fee for churching a woman at the usual time, whether she is churched or not, is void; because uncertain as to the time, and unreasonable, for she may be dead. Ld. Raym. 1558.]

(F 13.) Or, allows illegal, or disallows legal evidence.

So, a prohibition lies, if another court determines by improper evidence; as, if the commissioners of appeals for the excise determine by minutes of the evidence, taken by a justice of peace, and do not examine witnesses *viva voce*. R. 5 Mod. 272.

So, if in the spiritual court, payment, &c. pleaded, is disallowed, because proof of it is made only by a single evidence. Cont. 1 Rol. 12. 1 Sid. 161. R. acc. 2 Rol. 414. R. 3 Mod. 286. 1 Sho. 158. Carth. 142. Vide post, (G 28.)

But there shall not be a prohibition, because the spiritual court requires proof of a negative; as, if to libel for tythes, the defendant pleads that the parson did not read the 39 articles, and the court requires proof of the plea; for it is presumed at law that the parson did read them, if the contrary be not proved. R. 1 Rol. 89.

(F 14.) Or, tries a matter triable by law.

So, a prohibition lies, if the spiritual court proceeds to the trial of a custom, or prescription, which are triable only by the common law. Carth. 33. Vide post, (G 10.)

If it proceeds to try the limits of a parish, which are triable by the common law. 1 Rol. 332.

So, if, upon a libel for tythes, the defendant makes title by lease; for this is determinable by the common law. R. 1 Rol. 61.

[Where a *modus* is pleaded to a suit in the ecclesiastical court for tythes, its jurisdiction is at an end. 1 T. R. 552.]

So, if upon a libel for an account against an executor, he pleads a deed of gift by the testator of his goods to another, and the spiritual court does not allow it. R. 1 Rol. 123.

If on a libel for tythes due only by custom, the custom is denied. Per three J. Het. 18.

So, if it proceeds to swear a parish-clerk, churchwarden, &c. named by the parson, when by custom he should be named by the vestry. R. 2 Cro. 670.

But, after verdict for a custom or prescription, which allows a jurisdiction in the spiritual court, a consultation goes. Carth. 33. Het. 13, 14.

So, a prohibition goes, if the spiritual court, in a cause within their jurisdiction, examines to matters *dehors*, as, where a grant of an administration is prayed to be revoked, if the spiritual court examines him concerning covenants, or what land he has by descent, &c. Mo. 906.

In a prosecution in the spiritual court for incontinency, if the spiritual court examines the party upon oath, whether he did the fact alleged. R. Mo. 906.

(F 15.) If

(F 15.) If the court refuses a copy of the libel.

So, by the st. 2 H. 5. 3. and 2. (or 2 & 3) Ed. 6. 13. he that sues a prohibition must deliver to the court a copy of the libel; and therefore if the spiritual court refuses a copy of the libel, a prohibition lies *quousque*, &c. after which the spiritual court cannot proceed till a copy is granted. Mod. Ca. 308. Sal. 553. R. 4 Ed. 4. 87. b. Hard. 364.

If a prohibition be granted before a libel exhibited, he may afterwards exhibit it, but do nothing *ultra*. Per Holt, Mod. Ca. 308.

So, a prohibition shall be *quousque*, for refusing a copy of the articles. R. 1 Vent. 5. Mod. Ca. 87. Hard. 364.

And if he be excommunicated for want of an answer before a copy given, the prohibition shall contain a *mandamus* for absolving him. 1 Vent. 5. Ray. 170. R. 1 Sid. 403.

And if he has appeared, and is excommunicated for that cause, he shall be absolved without an oath *ad parend. mandatis ecclesie*. 1 Sid. 232.

So, there shall be a prohibition for refusing a copy of a libel, though the proceeding be *ex officio*, as well as between party and party. R. cont. Mo. 756. 2 Cro. 37. Semb. acc. 2 Cro. 388. R. acc. Ray. 170. R. Mod. Ca. 87. Acc. Mo. 917. Per Holt, Sal. 553.

So, there shall be a prohibition, if the libel exhibited does not ascertain the offence; as, if it be for certain offences. Hard. 364.

So, after a prohibition for refusing a copy of the libel, if a copy be granted, he may have another prohibition upon the merits. R. Mo. 917.

But if a copy be granted, the first prohibition shall be discharged *ipso facto* without a writ of consultation. Mod. Ca. 308.

And therefore, there cannot be a prohibition for denying a copy of the libel, and upon the merits, together; for if the prohibition for refusal of a copy be discharged, by the granting it, there may afterwards be a prohibition upon the merits. R. Mod. Ca. 308.

So, if a prohibition for refusing a copy of a libel be absolute, it shall be discharged by a *supersedeas*. 1 Vent. 5.

So, a prohibition for refusing a copy ought not to be granted till an affidavit of the refusal. 1 Vent. 252.

(F 16.) If a parson, &c. does waste.

So, a prohibition goes to prevent damages to any ecclesiastical possession; as, if any does waste in the houses of a parson. R. Mo. 917. 1 Rol. 86, 167.

Or, cuts down trees growing upon his lands. Mo. 917. R. 1 Rol. 335.

Though it be for iron-works, or other uses, except the repair of the church. 1 Rol. 335.

So, if a parson, after a recovery against him in a *quare impedit*, continues in possession, and commits waste. Ibid.

So, if the vicar cuts down a tree in the church-yard. 2 Rol. 111.

[The court of Common Pleas has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the pos-

sessions of his see; at least at the suit of a stranger. 1 Bos. & Pul. Rep. 105. Semb. That no court of common law has that power. Ibid. *Quære*, If the court of chancery has that power? Ibid.]

(F 17.) Prohibition *quoad*, &c.

So, if a suit be in the spiritual court for a matter within their consue-  
sance, mixed with matter of which the court has no jurisdiction, a  
prohibition shall go *quoad* the part of which it has no jurisdiction.  
R. Mo. 873. Sti. 10. 1 Sid. 251.

As, if in a suit for tythes the sentence be for the treble value, there  
shall be a prohibition *quoad* the treble value. R. Mo. 873.

So, if a suit be against a bishop for granting institution and in-  
duction, after a *duple querela* against him, there shall be a prohibition  
*quoad* the repeal of the institution, not *quoad* the contempt. R.  
Mo. 879.

(G) When a prohibition shall not be granted.

(G 1.) When the spiritual court has jurisdiction: — As if  
the suit be *circa mere spiritualia*.

But a prohibition does not lie, if the spiritual court proceeds only  
for a matter within their jurisdiction.

By the st. *de circumspecte agatis* 13 Ed. 1. the court Christian shall  
hold plea of things *mere spiritualia*, notwithstanding the king's pro-  
hibition; as, for penance, corporal or pecuniary, *pro peccato mortali*.

And, therefore, the spiritual court may punish, by ecclesiastical  
censures, apostacy, heresy, blasphemy, schism, &c. 5 Co. 9. a. *De*  
*Jure Eccl.* 2 Inst. 488.

So, fornication, adultery, &c. 5 Co. *De Jure Eccl.* 9. a.

Incest, or solicitation of chastity. 5 Co. *De Jure Eccl.* 9. a.  
2 Inst. 488.

Suspicious, living without marriage. R. Jon. 259.

So, adultery, &c. though the husband had an action for an assault  
upon his wife. Per Holt, Sal. 552.

Neglect to resort to church for divine service. 1 Sal. 166. Mod.  
Ca. 189.

So, if a man does not resort to the parish church. Dub. 1 Sal. 166.  
Mod. Ca. 189. Vide infra.

If he resorts to an unlawful conventicle; for false worship is with-  
in ecclesiastical consueance. R. 2 Vent. 44.

So, the granting of orders belongs to the spiritual court. 2 Inst.  
488. 5 Co. *De Jure Eccl.* 9. a.

So, the granting of a licence *ad prædicandum*. Vide infra.

And a prohibition shall not go, though it be to him who has a  
donative. R. 1 Mod. 90. 2 Keb. 876. Vide infra.

So, the admission and institution of a clerk are within the juris-  
diction of the spiritual court. 5 Co. 9. a. *De Jure Eccl.*

So, simony is within the jurisdiction of the spiritual court; and if  
a suit be there to punish it, a prohibition does not lie. 2 Rol. 292.  
l. 40. Mo. 914. 5 Co. 9. a. *De Jure Eccl.*

Though the suit be after a presentation to the church upon the  
simoniacal contract. R. 2 Rol. 292. l. 40.

So,

So, if a parson be by simony, and he sues in the ecclesiastical court for tythes, and the defendant pleads that he is *simoniacus*, a prohibition does not lie. Semb. Mo. 777.

So, the celebration of divine service is of spiritual consueance. 5 Co. 9. a. *De Jure Eccl.*

And therefore, if the spiritual court proceeds to punish the neglect of the celebration, a prohibition does not lie. Co. L. 96. a.

Or, if it proceeds by libel for not taking the communion in his parish-church. Hard. 406.

Though he pleads that he received it *alibi*; for the spiritual court is judge of it. R. Hard. 406. R. cont. Skin. 101.

So, if the libel be, that he did not resort to his parish-church. Semb. 2 Rol. 438. 455. Vide supra.

So, if the spiritual court proceeds against any one because he preached without licence, a prohibition does not go. Vide supra. Vide F 8. contra.

Though it be by the incumbent of a donative. Semb. 1 Mod. 90. Vide Donative. — Vide supra.

[To a suit for baptizing, and performing other ministerial offices in the parish of A. without licence from the bishop. 2 Wils. 79.]

[To a suit for brawling or smiting in a church or church-yard, though there has been no previous conviction at law; for that relates only to striking with a weapon, or drawing it to strike. 1 B. M. 240.]

So, if the spiritual court proceeds for defamation of the common prayer. 2 Mod. Ca. 338.

So, for defamation of the church established in England. 2 Mod. Ca. 338.

So, the instruction of youth is within their consueance; and, therefore, a prohibition does not lie upon a libel for teaching school without licence. 1 Mod. 3. Unless they demand the penalty by the statute. R. 2 Lev. 222.

[Masters of grammar-schools must be licensed by the ordinary, who may examine a party applying for a licence as to his learning, morality, and religion. 6 T. R. 490.]

## (G 2.) For the repair or ornaments of the church.

So, by the st. 13 Ed. 1. *de circ. agat.* the court Christian shall hold plea for not repairing or adorning the church, or not inclosing the church-yard. 5 Co. 9. a. *De Jure Eccl.*

And, therefore, if a suit be there for not repairing the nave of the church, a prohibition does not lie. F. N. B. 80. N. 2 Inst. 489. R. 5 Co. 67. Jeffreys. R. 1 Mod. 194. 236.

And if a suit be for not repairing of the church generally, a prohibition does not go; for it shall be intended only *pro nave ecclesie*. 1 Mod. 236.

So, if a suit be for not providing ornaments agreed by the vestry; as, more bells, &c. R. Poph. 197.

[No prohibition lies to suit of the ordinary to deface ornaments (as arms) set up in a church without his consent. Str. 570.]

[If, in a dispute before the ordinary about erecting a monument, one appeals to the arches, such appeal lies, and no prohibition shall go. Andr. 69.]

Or,

Or, for not repairing a public chapel, which belongs to a church. 2 Inst. 489.

So, if a suit be against a parson or impropriator, for not repairing the chancel. 1 Mod. 280. 2 Mod. 259.

Though the ecclesiastical court proceeds to sequester the profits of the impropriation for such intent. Per three J. North dub. 1 Mod. 259. R. cont. 2 Mod. 259.

Though it be suggested that he was overcharged; for he may have remedy upon an appeal. R. 2 Rol. 289. l. 40.

Or, that all the parishioners are not rated. Cont. 2 Rol. 291. l. 12. R. acc. 2 Rol. 290. l. 15. R. 1 Vent. 308.

Or, that he has been exempted for sixty years; for he ought to show his exemption. R. 2 Rol. 290. l. 10.

Or, that he repairs a chapel of ease in the same parish. 2 Rol. 311. l. 20. 1 Rol. 126.

Though a small matter be inserted in the same rate, other than for the repair of the church; as, for the prisoners of B. R. Lut. 1023.

So, if a rate be by vestry of a parish for the repair of a church, the spiritual court may enforce the payment. 1 Mod. 194. R. 2 Mod. 8.

So, if a rate by commission of the ecclesiastical court, or by some parishioners, be confirmed by the vestry. 1 Mod. 194.

So, if a rate for enlarging or rebuilding the church. 1 Mod. 236. R. 2 Mod. 222.

[So, on a rate made for erecting galleries, said in the libel to be rated according to an antient and standing rate, and to be *perpetua futur. temporibus*. Fort. 346.]

So, if a suit be for a rate assessed upon the hall of a company in London, in the same parish. R. 2 Jon. 187.

[In a suit for removing the reading-desk, where the judge was the person that read prayers, and the sentence by default, prohibition denied; for no difference between sentence by default or on hearing; and no prohibition after sentence, for there may be an appeal; and so, if a man judge in his own cause. Fort. 199.]

[If in a cause to obtain a faculty to erect an organ, there is a citation to the parishioners to show cause, the court will not grant prohibition, on a suggestion that the ecclesiastical court are about to try a custom; for the citation was nugatory, the parishioners consent being unnecessary, and the prohibition would be immaterial. 3 B. M. 1689.]

But a prohibition lies, if a man is charged to the repairs, who, by custom or law, ought to be exempted. 2 Rol. 289. H. 290. l.

Who shall be exempt or not, vide *Eglise*, (G 2.)

So, if the charge is expressly to the repair of the chancel as well as *navis ecclesie*. 1 Mod. 236.

If a libel be for non-payment of a rate made for repairs by a commission out of the ecclesiastical court, without consent of the vestry. R. 2 Mod. 8.

So, a prohibition does not lie for a suit for the not finding decent ornaments in the church. 2 Inst. 489. Lutw. 1023.

Who shall find ornaments, vide *Eglise*, (G 2.)

Nor,

Nor, to a suit for a faculty to have a seat *in nave ecclesie*. God. 200. Vide post, (G 3.) — *Eaglise*, (G 3.)

Nor, to a suit for a way to a church, if the prescription, or right, to it is not denied. Semb. 2 Rol. 41.

But a prohibition lies upon a suit for ornaments, when he was not a parishioner. R. 2 Rol. 262. 270.

Or, if charged by a rate upon his land; for it is a personal duty. 2 Rol. 262. 270.

[The ordinary cannot punish a single trespass in the body of the church, if it does not hinder divine service; as, for making a hole in the church-wall, or cutting the boughs of a yew-tree in the church-yard. Bumb. 229.]

(G 3.) For not inclosing the church-yard, &c.

So, a prohibition does not lie if a suit be there for not inclosing the church-yard. 2 Inst. 489.

Nor, for a nuisance, or other matter done in the church-yard. R. Carth. 152.

But a prohibition lies, if a suit be in the spiritual court to enforce any one, bound by prescription, to maintain the fence of his land next to the church-yard; for this is a charge upon a temporal inheritance. 2 Rol. 287. l. 35.

[Prohibition lies to a suit to show cause why licence should not be granted to build a charity-school in the church-yard. Str. 1126.]

Or, for an erection upon his soil, not part of the church-yard, though he stops the lights of the church. R. Carth. 152.

So, it lies, if a suit be there *ex officio* for a way to the church. R. 2 Rol. 287. l. 1. 5.

Or, for finding entertainment for the parishioners, in his house, in their perambulation. R. 2 Rol. 287. l. 15.

So, a prohibition does not lie upon a suit for dilapidations. 5 Co. 9. a. *De Jure Eccl.*

Nor, to have a faculty for a seat *in nave ecclesie*. Godb. 200. Vide ante, (G 2.)

Or, for enjoyment of a seat which he claims by a prescription, if the other, who prays the prohibition, does not insist also upon a prescriptive right in himself. R. Sal. 551.

But if a libel be in the spiritual court for a seat, where the other by prescription has enjoyed and repaired it, a prohibition lies. Vide *Eaglise*, (G 3.)

So, if the ordinary direct a seat to A. and his heirs, without restriction to the time that they continue parishioners, it will be bad, and a prohibition goes. R. 2 Rol. 24.

(G 4. a.) For admission to a spiritual office.

So, a prohibition does not lie, if a suit be in the spiritual court, for admission to a spiritual office; as, for swearing churchwardens chosen, according to the can. 9 Jac. 89., which directs, that one shall be named by the minister, the other by the parishioners. Vide ante, (F 4.)

To

To swear churchwardens to do their office generally. R. 1 Vent. 127. 2 Mod. 278.

[To a libel for not taking on him the office of chapel-warden, prohibition does not lie, though the church be a donation. Str. 715.]

So, if a suit be for having been admitted to deacon's orders before the age of twenty-three, or to priest's before twenty-four years; though this be prohibited by the st. 13 El. 12. R. 3 Mod. 67.

So, a prohibition does not lie, if there be a libel to compel churchwardens to do their duty; as, to render an account according to the can. 3 Jac. 89. where they refuse to account. Adm. 2 Rol. 71. 2 Jon. 132.

But, if the spiritual court will swear both churchwardens chosen by the parson upon some antient canon, and refuse him chosen by the parishioners, a prohibition goes. R. 2 Rol. 287. l. 25.

So where, by custom, the parish chooses both, and the spiritual court will admit one chosen by the parson. R. 2 Rol. 287. l. 30.

So, if a suit be there, to compel the churchwardens to account there, where by custom they ought to account before twenty-four heads of the parish. R. Lut. 1029.

Or, to compel an oath to do a thing out of their office. Semb. 1 Vent. 114. 127. Vide *Eglise*, (F 1.)—*Serement* (B).

Or, to compel one to be sworn, who has a privilege to be exempted. Pal. 392.

Or, to compel an account in the spiritual court, after an account before the minister and parishioners, according to the can. 3 Jac. 89. without cause. R. 2 Rol. 71. Adm. 2 Jon. 132. R. M. 4 Geo. 2. in exchequer, inter Snowden and Herring. Vide *Eglise*, (F 2.)

So, if by custom the parishioners choose a parish-clerk, and a libel be to establish another, chosen by the parson according to the canon, a prohibition goes. Godb. 163.

Though the libel be against him for a collateral matter, which supposes him no clerk. Ibid.

[If there is a suit for removing a parish-clerk, and punishing him for immoralities punishable by the temporal laws, there may be a prohibition as to all but the deprivation, but not as to that. Ld. Raym. 1507. Str. 776.]

#### [(G 4. b.) Over churchwardens.]

[An ecclesiastical court may compel churchwardens to deliver in their accounts, but cannot decide on the propriety of the charges. 3 T. R. 3.]

#### (G 5.) For tythes:—Though the suit be for a right under a fourth part of the value of the church.

Conusance of the substruction of tythes, by a parishioner from the parson, belonged originally to the spiritual court. Semb. cont. 2 Inst. 489. Acc. 2 Inst. 363. 490. Vide *Dismes*, (M 2.)

Not the conusance of the right to tythes. 2 Inst. 489. 661.

But now, by the st. *circ. agat.* 13 Ed. 1. art. Cl. 9 Ed. 2. 1, 2. the court Christian shall hold plea of the right, as well as of the substruction of tythes, if a fourth part of the value of the church be not demanded.

By

By the st. 27 H. 8. 20. and 32 H. 8. 7. any person, ecclesiastical or lay, may convene for substruction of tythes before the ecclesiastical judge.

And, by a proviso in the st. 32 H. 8. and 2 & 3 Ed. 6. 13. a suit for such substruction shall be before the ecclesiastical judge, and not before any other judge.

So, by the st. 2 & 3 Ed. 6. 13. if predial tythes be carried away without being set out, &c. the party may sue for the double value before the ecclesiastical judge, according to the ecclesiastical laws.

And, therefore, in all cases where a suit lies by spoliation in the spiritual court for the right to tythes, no prohibition shall go; viz. where the right to the patronage or presentation cannot come in debate. F. N. B. 37. E. 51. C. Vide Dismes, (M 1.)

But where the right of patronage may come in debate, a prohibition goes; for their spoliation does not lie; as, if the defendant does not claim by institution. Vide Dismes, (M 1.)

Or, claims by the presentation of another patron. Vide Dismes, (M 1.) — Ante, (F 3.)

Or, above the fourth part of the value of the church. Vide Dismes, (M 1.)

(G 6.) Or, if it be between spiritual persons.

So, if a suit be in the spiritual court for tythes, where the question is, whether they belong to the parson or the vicar? no prohibition goes; for both are spiritual persons. R. 2 Rol. 310. l. 25. 2 Rol. 55. 2 Bul. 157. 1 Leo. 94. 128.

[Where the right to tythes is admitted, and a question arises between the rector and vicar to whom they are payable, that question is triable in the spiritual court, and no prohibition lies. Will. 680.]

[As, in a libel against a parishioner for tythes of turnips; who pleads a custom to pay to impropiator.]

Or, whether they belong to the parson or the chantor. R. 2 Rol. 310. l. 25.

Though one of them claims by letters patent. R. 2 Rol. 310. l. 45.

So, if a suit be between the vicar and the lessee of the impropiator. Dub. F. g. 79.

So, if a suit be by a parson against an impropiator being a layman, where the question is only whether they are great or small tythes.

Though the impropiator insists that by custom the land ought to be sown with corn. R. 2 Rol. 310. l. 50. 311. l. 35. 312. l. 30.

Or, if a suit be for a portion of tythes in the parish of B. and the parson of B. claims *pro interesse suo*. R. 2 Rol. 312. l. 20.

Though the bounds of the parish be in dispute. R. 2 Rol. 312. l. 30.

So, if a suit be against A., being a parishioner, for a portion of tythes, or upon a *modus*, who insists that it belongs to the vicar, or *vice versa*. R. 2 Rol. 311. l. 10. Mo. 937. Godb. 50.

Or, to him, by a lease from the vicar. R. 2 Rol. 310. l. 30.

Or, to the vicar, by endowment of the parson. R. cont. 7 Car. but R. acc. 11 Jac. 2 Rol. 310. l. 35. Semb. cont. Mo. 780.

[If the archdeacon sues for procurations, though against a curate, where

where there is a rectory impropriate, and no vicarage endowed. Str. 421.]

(G 7.) Or, if the suit be upon subtraction of tythes, &c.

So, if a suit be in the spiritual court for tythes subtracted or detained, no prohibition goes. Vide Dismes, (M 2.)

Though the parishioner alleges a custom to take back thirty sheafs of tythes severed, without more. Semb. Godb. 234.

Though the parishioner severs his tythes, and afterwards carries them away. Mo. 912. Cro. EL. 607.

Though the parishioner has made a composition for them by parol, if there be not a lease for life, or for years, R. Carth. 70.

So, if the suit be for a *modus*. Latch, 125. 3 Bul. 241.

Or, for tythes due only by custom. Pal. 380.

(G 8.) Except where no tythes are due: — As, where a thing by law is not tithable.

But if a suit be in the spiritual court for tythes of things, for which no tythes are due *per legem terræ*, a prohibition goes. R. 1 Rol. 379. 1 Rol. Abr. 635. C. 641, 642. 644, &c. Seld. de Dec. ch. 14. s. 8. Vide Dismes, (M 9.)

Or, for tythes of barren land, exempted for seven years by the st. 2 & 3 Ed. 6. 18.

Or, for tythes in specie, where a personal tythe only is due. 2 Cro. 523, 524.

So, if the suit be for tythes of a prebend from a bishop, who prescribes (as he may, being a spiritual person) *in non decimando*. R. 1 Rol. 264.

Or, for tythes from a parson, for his glebe, to the vicar. R. Cro. EL. 578. Vide ante, (G 6.)

So, if a suit be for tythes due by custom, where the custom is denied, a prohibition goes till verdict for the custom. R. Het. 13.

(G 9.) Or, is discharged by statute.

So, a prohibition shall go where a suit is in the spiritual court for tythes of lands discharged by the st. 31 H. 8. 13. Vide Dismes, (M 9.)

Though the plea be double, or informal; for if no tythes are payable, a prohibition goes. Semb. F. g. 191.

(G 10.) Or, by a *modus decimandi*.

So, where the suit is for tythes in kind, when a parishioner prescribes *in modo decimandi*. What *modus* is good, vide Dismes, (E 10, &c.)

Or, when the suit is upon a *modus decimandi*, and the *modus* is denied. Latch, 210.

Or, a different *modus* alleged. R. 1 Rol. 419. 1 Vent. 32.

[A prohibition cannot be granted on a suggestion of a *modus*, till the *modus* is pleaded below. B. R. H. 537.]

[If a man libels for tythes in kind, and defendant insists on a *modus*, but permits the spiritual court to proceed to sentence, he is too late to apply for a prohibition. Bunb. 17.]

So,

So, though the parishioner prescribes that the parson shall have every tenth ridge of land *incipiendo ab ecclesie*, and afterwards by covin omits to sow those ridges; for that does not entitle the parson to tythes in kind; but he shall have an action upon the case for the fraud. R. Ma. 913.

Though the suit be by the vicar, and a *modus* is alleged to be paid to the parson. R. 1 Sid. 332.

So, where A. claims a portion of tythes in B.'s parish by prescription, and B. sues in the spiritual court for them; for the prescription is a temporal matter. Per two J. Godb. 45. Vide ante, (G 6.)

So, if the defendant in the spiritual court claims the tythes by a lease; for the validity of the lease is determinable by the common law. R. 1 Rol. 61. Vide ante, (F 14.)

So, if the defendant lives within an hamlet, where there is a chapel of ease, and out of his tythes maintains a clerk there, and pays a certain sum by prescription to the parson for the residue. R. 4 Leo. 24, 25.

So, if the suit be for tythes against B., who pleads that he set out his tythes, and the plea is disallowed, because he did not give notice of the severance to the parson. Carth. 143.

If the suit be against the vendee of hay, corn, &c. after severance; for they are due from the occupier of the lands, who sold it. R. 2 Rol. 78.

If in a suit for tythes for wool, the defendant alleges a custom to pay at Lammes, and the spiritual court disallows it. R. Cro. El. 702.

So, if the suit be for tythes, where a composition is made for them between the parson and parishioners for life or years.

Though the composition be by parol, if it is not determined. Semb. cont. Carth. 70.

Though the composition be with A., his executors and assigns, during the life of the parson, and A. afterwards leases to B. at will, and the parson sues B.; for he has a remedy by law upon the contract against A., though not against B. R. Pal. 377.

Otherwise, if the agreement amounts only to a covenant, not to a lease or composition. 2 Rol. 121.

[If a *modus* is pleaded to a libel for tythes by the vicar, and the defendant applies for a prohibition, on a suggestion that the tythes are due to the impropriator; yet, if it appears that they are examining witnesses below to the *modus*, prohibition shall go. B. R. H. 203.]

[If ecclesiastical court refuses to plea of parol agreement with the agent of impropriator for purchase of the tythes, the corn being then severed, prohibition goes. 3 B. M. 1873.]

[If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant. But if any *modus* be found, though different from that laid, that is a ground for the court to refuse a consultation. 1 T. R. 427.]

#### (G 11.) For oblations, mortuaries, pensions.

So, by the st. *circ. agat.* 13 Ed. 1. et *art. Cleri.* 2 Ed. 2. 1. the court Christian shall hold plea for oblations, obventions, mortuaries, pensions. 5 Co. 9. a. De Jure Eccl.

Oblations comprehend the customary payments of every communicant, or for marriages, christenings, churchings, or burials.

By

By custom, in many places, 2*d.* is due as an oblation for every communicant at Easter, and in London 4*d.* for each house.

By the st. 2 & 3 Ed. 6. 13. every person, who ought to pay his offerings, shall yearly pay them to the parson, &c. where he dwells, at the four offering-days accustomed for four years past, or otherwise at Easter.

And if a suit be for those oblations in the spiritual court, a prohibition does not lie.

But a prohibition goes, if, by custom, nothing is due for oblations.

So, if a suit be in the spiritual court for a mortuary due by law, a prohibition does not lie. Dub. Carth. 97.

But by the st. 21 H. 8. 6. none, on pain of 40*s.* and the value of the sum taken, shall take any mortuary, or any thing for it, but in places where mortuaries have heretofore been used to be paid.

And then no mortuary shall be demanded, where the moveable goods of the deceased are under ten marks.

And no more than 3*s.* 4*d.* where his moveable goods are ten marks value, clearly above his debts, and under 30*l.*

And no more than 6*s.* 8*d.* where, at his death, his moveable goods are 30*l.* value, or more, above his debts, and under 40*l.*

And no more than 10*s.* of what value soever his goods be.

And that no person pay more than one mortuary, and that at the place of his most dwelling or habitation.

And that no mortuary be paid for a *feme covert*, child, or any not a housekeeper, nor any wayfaring man, not having residence where he dies, whose mortuary shall be paid at the place where he mostly dwelt.

Provided, that the bishops of Bangor, Landaff, St. David, St. Asaph, and the archdeacon of Chester, may take such mortuaries of the priests in their dioceses or jurisdictions, as have been accustomed.

Provided, that where less than the rates before said hath used to be paid, no more shall be paid than usual.

And therefore, upon a suggestion, that no mortuary is due by custom, and that a plea of it was denied in the spiritual court, a prohibition goes; for the custom shall be such as is allowed by the common law. R. Lutw. 1069. Semb. 3 Mod. 268. R. Cro. El. 151. Dub. Cro. Car. 238. [D. acc. Ld. Raym. 609.]

[But a prohibition is not grantable upon a mere suggestion of the custom, unless such custom has been pleaded in the spiritual court, and the plea has been rejected. R. Ld. R. 609.]

But if a suit be for a pension in the spiritual court, a prohibition does not go. F. N. B. 51 B. 2 Inst. 491. 2 Sho. 97. 1 Vent. 120. R. 2 Cro. 217. [M. 4 G. 2. 1. T. 19.]

And shall be disallowed in all cases where a pension is claimed by the ordinance of the ordinary, as a judge; for the suit for it ought to be there. Cro. El. 675.

So, if the pension commenced by grant of the patron and ordinary, though annuity lies for it; for it may be sued for in the spiritual or temporal court. Cro. El. 675.

Or, if it be claimed by prescription. F. N. B. 51 B. Cont. 2 Inst. 491. Acc. 1 Sid. 146. 1 Vent. 3. 120. 265. 1 Sal. 58.

Though

Though the prescription be alleged, as is usual in the ecclesiastical court, only for forty, fifty, or sixty years. R. 2 Cro. 666.

So, a prohibition does not go, though the suit be in the spiritual court, before a demand; yet the st. 34 H. 8. 19. says, if wilfully denied. R. 2 Rol. 300. l. 45.

*A fortiori*, if the suit be there for a pension between spiritual persons. R. Godb. 196.

So, a prohibition does not go, though the pension commenced upon an appropriation by the pope's bull; though by the st. 28 H. 8. 16. bulls of the pope are now void; for this was only inducement to the title, which subsists by the grant of the pension. R. 2 Lev. 251.

So, a prohibition does not go to a suit there for proxies, &c. by prescription or grant; for by the st. 34 H. 8. 19. the ecclesiastical jurisdiction is saved. Hard. 181.

But a prohibition goes, if the prescription be denied. 1 Vent. 265.

If he ever had sued for it by a writ of annuity. F. N. B. 51. B. Godb. 196.

If it be granted by deed. Semb. 2 Inst. 491.

If it be claimed by one who cannot prescribe; as, a curate of a chapel of ease; for he is removeable *ad libitum*. Sal. 506.

(G 12.) For violence to a clerk.

So, by the st. *Circ. agat.* 13 Ed. 1. the court Christian shall hold plea of violence to a clerk; and therefore if a suit be there to punish by ecclesiastical censures *pro salute animæ*, a violence done to any one *infra sacros ordines*, no prohibition lies. F. N. B. 51. K. 52. F. 2 Inst. 492. Sal. 548.

But if a clerk sues in the spiritual court for an assault, after an action by him, tried at the common law, and a verdict against him, upon *son assault demesne* pleaded, if the defendant pleads *son assault* in the spiritual court, and the plea is refused, a prohibition goes. Semb. Skin. 20.

So, if the spiritual court refuses a plea of *mollitur manus* in defence of his servant, who was assaulted by a clerk who sued there for the violence. R. Mo. 915.

(G 13.) For breach of faith.

So, by the st. *Circ. agat.* 13 Ed. 1. the court Christian shall hold plea *de lesione fidei*.

And therefore a prohibition does not lie, if a libel be to oblige one to penance, who does not perform his oath or promise. 2 Rol. 283. l. 35. 40.

So, for perjury in the spiritual court, in a cause within their consance. Sal. 134. Bro. Jurisdiction, 20. Vide ante, (F 6.)

But, if the spiritual court proceeds against any for a false oath in a temporal court, or in a temporal cause, a prohibition lies; for *jurisdictionem non mutet fidei interpositio*. 2 Inst. 493. 2 Rol. 283. l. 27.

As, against a juror, who gives a false verdict. 2 Rol. 304. l. 20.

Or, an indictor, who gives a false oath on an indictment of felony. R. 2 Rol. 304. l. 15.

So, if a libel be against one who swears to pay a debt, make a feoffment, &c. and does it not. F. N. B. 43. D. 2 Rol. 233. l. 30.

If he swears that he will not sue an action, and afterwards sues it. F. N. B. 42. I.

So, if he takes a will out of the spiritual court, and gives a bond to re-deliver it, he shall not be sued for a breach of his faith, if he does not re-deliver it; for there is a remedy upon the bond. 2 Mod. Ca. 327, 328.

So, if a man be cited as a witness in the spiritual court, a prohibition does not lie.

Or, to make answer upon oath to a libel for a matter within their consuance; as to discover whether he has paid a rate for repairing the church. R. 1 Vent. 339. R. 2 Lev. 247.

Or, to take the oath of a churchwarden. R. 2 Mod. 118.

But if any be required to take an oath, which tends to the accusation of himself, a prohibition lies. 2 Mod. 118. 278. Vide Serement (B).

Or, to discover a thing which may subject him to censure or punishment.

Though the matter be notorious; as, that he was with his head covered in church at divine service. Cont. per Wind. Sed qu. per Reporter. 1 Sid. 232.

#### (G 14.) For defamation.

So, by the st. *Circ. agat.* 13 Ed. 1. the court Christian shall hold plea for defamation, when damages are not demanded.

Where the defamation charges a crime merely spiritual; as, if the libel be, that the defendant called him heretic, schismatic. 2 Inst. 492. R. 4 Co. 20. 7 Co. 44.

That the defendant charged him with adultery. F. N. B. 51. I.

Or, used words which accuse directly with incontinence. R. Lut. 1038. 1042.

As, if he said, You are a whore; for no prohibition lies for it since 8 Car. R. Cro. Car. 110. 2 Rol. 297. l. 45. R. 1 Sid. 404. 433. 1 Mod. 21. 1 Vent. 7. 61. 220. R. 2 Lev. 63. Cont. before 8 Car. Jon. 44. [Vide 2 Term Rep. 473.]

["Thou art a jilt and a strumpet;" prohibition denied per Cur. Bunb. 260. Str. 823.]

["She was never married, and what is her hopeful son?" amount to a charge of whoredom. R. Ld. R. 508.]

[So saying of a woman, "I have kept her common these seven years," amount to a charge of whoredom. R. 2 T. R. 473.]

[So saying of a woman, "that she had a bastard," amount to a charge of whoredom. R. cit. Ld. R. 104.]

[But to say of a widow, "that her thighs are bare," and "a man between them," does not. R. Ld. R. 103.]

["Moll Winter is a whore, and a common whore, and plier in a bawdy-house;" refused after sentence. Bunb. 312.]

You are a Welch jade, with an averment that that imports a whore. R. 2 Rol. 297. l. 45.

He is a whore-master. R. Sal. 692. Skin. 390.

He is a cuckold; if the libel be by the husband and wife. Lut. 1038. 2 Rol. 296. l. 40. Cont. 1 Sid. 246. Cont. per Holt, Sal. 692. R. 2 Lev. 66.

[Or

[Or by the wife only. R. Ld. R. 637.]

He is a pander of A. Per two J. Whitl. cont. 2 Rol. 295. l. 55.

She will be a meddling with a ———. 2 Rol. 295. l. 45.

He is a son of a whore, without more; for that imports that he is a bastard, and his mother a whore. R. 3 Lev. 119.

A cuckoldy knave. R. Cro. Car. 339.

You was A.'s whore before he married you. R. 3 Lev. 137.

He keeps a whore in his house. R. 3 Lev. 350.

She has had a bastard. Dub. Sho. 337.

He is a wittol; for that imports that he knows of the adultery of his wife. Sal. 692.

Though the words import a spiritual crime, which in some respect is punishable by the common law, if the spiritual jurisdiction is not taken away; as, if he says, A. keeps a bawdy-house: for though it be indictable, the spiritual court has a concurrent jurisdiction. 2 Rol. 296. l. 5. Cont. Noy, 117. Vide infra.

A. is a common bawd. R. 2 Rol. 295. l. 5. Jon. 246. Pal. 521.

Thou art a whore, and thy children bastards; for the statute saves the spiritual jurisdiction. 2 Rol. 296. l. 25.

A brandy-nosed whore, and drinks brandy. R. Sal. 693.

If he says of a widow, She was never married, and what is her son? R. Carth. 498.

So, if the defamation imports any charge whereby he may have prejudice in the spiritual court; as, if he says of a parson, He will preach nothing but lies and malice in the pulpit. R. 3 Lev. 17.

He lies with all the women in the parish. R. 3 Lev. 18.

So, if he says of a parson, speaking of his function, He is a knave. R. 2 Rol. 297. l. 40. Per Holt, 8 W. 3. (Com. 25.) Semb. Lut. 1054. 1 Sid. 393.

If he says of any man, You are a son of a witch; for it is an impediment to the taking of orders. R. 2 Rol. 295. l. 5. 1 Rol. 407.

He will not hear a minister ordained by a bishop. R. 2 Rol. 295. l. 42.

So, there shall be a libel for defamation, though provoked by scurrilous words. R. 3 Lev. 137. Semb. Lut. 1054.

But if a libel be for words which are actionable, a prohibition goes; as, if they charge with felony. F. N. B. 53. F. R. 2 Rol. 295. l. 10. Jon. 246. 22 Ed. 4. 20. Mo. 906. R. Jon. 320.

Or, with perjury. 2 Inst. 493.

So, if he says, he was forsworn before a judge; for they are actionable, if well alleged. R. 2 Rol. 297. l. 5.

So, if he says of an heir, He is a bastard. 2 Rol. 292. l. 14.

[Of a woman in London, She is a whore. Lut. 1040. 1042. 4 B. M. 2032.]

[No prohibition lies to a suit for calling a woman "whore," in London, unless the offender resides within the jurisdiction of the court in London. R. Ld. R. 711. Nor unless the words necessarily import whoredom. R. Ld. R. 103.]

["You are a cuckoldy old rogue, and was cuckolded by a porter," spoke in London; prohibition granted. Str. 471.]

["You are a cuckoldy dog, and bid the bitch your wife come out," spoke in London, prohibition granted. Str. 545.]

[For the word whore, though it appear on the face of the libel to be spoke in London, where action lies for it; prohibition denied after sentence. Str. 187. Fort. 347.]

[*Et per Cur.*—Matter *dehors* the libel shall not be alleged after sentence as ground for prohibition, it must arise out of the libel itself, in defect of jurisdiction; and in that case it is never too late for sentence; and all are a nullity. Ibid.]

[For the word strumpet, in London, prohibition denied, because after sentence; on above case. Fort. 347. Str. 555.]

[If motion and rule to show cause be before sentence given below, for calling a woman whore, in London, but rule not served till after sentence; prohibition shall not go. B. R. H. 392. Note, This is said to have been ruled on another point also; viz. that in the recital of the libel in the suggestion, the words are said to be spoken in the parish of St. B. in London, or in parts near adjacent; if it had appeared by the proceedings, or by affidavit, (which was now too late,) to be in London. Prohibition ought to stand; for the spiritual judge had no jurisdiction. Andr. 7. N. B. This is contrary to *Argyle v. Hunt*, and *Cock v. Wingfield*, supra.]

Of any woman, She is a bawd, and keeps a bawdy-house; for it is indictable. R. Jon. 44. Vide supra.

[No prohibition for "You are a bawd." Str. 1100. Andr. 286.]

So, if he speaks in London of a woman there, words tantamount to whore. R. 2 Mod. Ca. 114.

So, if part of the words be actionable, a prohibition goes for the whole, though the others charge with a spiritual crime; as, if he says, you are a whore and thief. 2 Rol. 297. l. 45. Per Twisd. 1 Sid. 404. R. 3 Mod. 74.

So, if the words relate to a temporal thing, of which the spiritual court has no consueance; as, You are a sower of sedition among neighbours. R. 2 Rol. 295. l. 35.

He would have buggered me; for that offence is felony. R. 2 Rol. 296. l. 50.

He kept my wife in his house against her will, to make her his harlot; for he might have false imprisonment. Godb. 63.

So, if words are spoken in evidence at a trial, or prosecution for an offence of which they are spoken. R. 1 Rol. 61.

So, if the spiritual court refuses a good justification of the words by the common law; as, to a libel for saying, You had a bastard, if the defendant pleads an order by two justices, which adjudged him the father of a bastard, and the spiritual court disallows the justification. R. 2 Cro. 535. 625. 2 Rol. 82.

So, if the words proceed from passion merely; as, if a parson calls another drunkard, upon which he says, You lie; and the parson libels for it. R. 2 Rol. 295. l. 22. 297. l. 25. Semb. Lut. 1054. Godb. 446.

[If one parson says to another, "you are an old rogue, and a rascal, and a contemptible fellow, despised and hated by every body;" prohibition lies. Str. 946.]

If a man says of a parson, he is a blockhead, and deserves his gown to be pulled over his ears. R. Sal. 692.

Or, he is a fool, ass, goose, &c. R. 2 Lev. 41. Godb. 447.

If

If a man calls another Drunkard. R. 2 Rol. 296. l. 30. Godb. 447. Mark. pl. 11. 103. R. Jon. 441. 305.

Knave. 2 Inst. 493. 2 Rol. 296. l. 45. Jon. 246. D. 1 Sid. 49. R. Sal. 548. 1 Rol. 217. 1 Vent. 2.

Though he be a parson, if he does not speak in reference to his function. R. 2 Rol. 295. l. 30. Cont. *ibid.* 40. R. 1 Vent. 2. 1 Sid. 393. R. H. 8 W. 3. (Com. 25.)

Base paltry rogue. Godb. 447.

So, if a man calls another, Son of a whore, and thy mother is a bitch. R. 2 Rol. 296. l. 20. Vide *supra*.

If he says You are a quean. R. 2 Rol. 296. l. 15. 1 Rol. 217.

If he says of a parson, He is a churl, or blacksmith's son. 2 Inst. 493. 2 Rol. 297. l. 25.

Of a proctor, He is a scabby knave, and pickerill bumb-bailiff. R. 2 Rol. 297. l. 15.

If he says, He is the devil, Belzebub, &c. Sal. 692.

Yet, after sentence, a prohibition shall not be granted, because they were words of passion, where the spiritual court has conusance. Semb. 3 Lev. 350. Lut. 1054.

Nor, after a plea which submits to the jurisdiction. 1 Vent. 10. Lut. 1042.

[Where prohibition is prayed for a matter not appearing on the face of the proceedings to be out of the jurisdiction, the suggestion must be verified by affidavit; therefore, though there is a custom, and that custom verified by affidavit, that whores, and calling a woman a whore, is punishable at Bristol by common law; yet, if there is not an affidavit that the words were spoken in Bristol, prohibition shall not go. Andr. 299. 304. N. B. In this case it was said, the same thing was held in *Argyle v. Hunt*, ante.]

[Yet a rule to show cause was granted, why prohibition should not go for calling a woman strumpet, in Bristol, though there was no affidavit of the custom. Wils. 62.]

(G 15.) For matters matrimonial.

So, the spiritual court, by consent of parliament, and the custom of the realm, has conusance of matters matrimonial and testamentary, though they do not belong to them originally. 2 Inst. 488.

As, of marriage, divorce, bastardy. 5 Co. 9. a. De Jure Eccl.

By the st. 18 Ed. 3. st. 3. ch. 2. if on demand of clergy, it be alleged that the prisoner hath married two wives, or a widow, the justices shall not have cognizance or power to try the bigamy, but it shall be sent to the spiritual court. By the st. 25 H. 8. 22. a person married within the Levitical degrees shall be separate by the sentence of the archbishop or bishop within their jurisdictions, and no other authority.

And, therefore, if a libel be for a marriage without licence, or banns published, a prohibition does not go. R. Jon. 259. Vide *infra*.

Or, by an insufficient licence, or not pursuing it. R. Jon. 259.

[The spiritual court has jurisdiction to proceed against persons for clandestine marriage, under the former canon law, received and allowed, but not under the canons of 1603,) per Hardwicke C.J. & tot. Cur. Str. 1056. B. R. H. 326.]

[Nor has the st. 7 & 8 W. 3. c. 35. which inflicts a penalty, taken away that antient jurisdiction. *Ibid.*]

[If, therefore, a man and his wife are sued for being married before

eight in the morning, without licence or banns, prohibition shall go as to the time, which is only against canons of 1603, and a consultation as to the rest. *Ibid.*]

So, if it be for punishment of an incestuous marriage after the death of the wife; if they do not proceed to dissolve the marriage, and bastardize the issue. *Sal. 548.*

So, if it be to dissolve an incestuous marriage; whereby the issue will be bastardized. *R. 2 Jon. 213.*

[The spiritual court may hold suit for marrying wife's sister's daughter. *Str. 53.*]

To repeal an administration to a second wife, because the first wife is living; whereby the issue by the second will be a bastard. *Sti. 10.*

So, if a libel be in the spiritual court for a marriage-portion, a prohibition does not go; as, for such a sum promised to be given with his daughter in marriage. *F. N. B. 44. A.*

So, if a libel be in the spiritual court, that he married without licence; though the marriage was by an incumbent of a donative within his precinct. *R. per three J. 1 Mod. 22.*

But a prohibition lies, if the spiritual court questions the marriage after the death of the parties. *2 Inst. 614. R. Sal. 548.*

Or, questions the power of the archbishop to grant a licence by the st. 25 H. 8. 21. without publication of banns. *R. Jon. 259.*

So, if a libel be *pro jactitatione maritagii*, after the husband is convict of felony in taking her for his second wife. *R. 3 Mod. 164.*

So, if a libel be to bastardize issue directly; for legitimacy shall be determined by the common law. *Sti. 10.*

So, if a libel be, by practice to dissolve a marriage for incest, and bastardize the issue, upon confession of the party only. *Semb. 2 Jon. 213. 2 Mod. 314.*

(G 16.) For matters testamentary; as, the probate of a will.

So, for a matter testamentary, the spiritual court (though it had no jurisdiction originally), yet shall have it at this day; and therefore the probate of a will for personal things shall be properly in the spiritual court, and no prohibition goes. *Sal. 552. Vide Administration, (B 6.)*

So, if a will be for things personal, and also for land, being entire, it shall be proved in the spiritual court, and no prohibition goes as to the land; for the probate there, as to that, does not prejudice, but shall be null. *R. cont. 2 Rol. 315. l. 10. for it shall go as to the land. So it was, R. 2 Cro. 346. R. Cro. Car. 165. 115. 2 Rol. 315. l. 20. R. 6 Co. 23. b. 1 Rol. 21. 358. 2 Rol. 431. R. Pal. 120. — But afterwards it was R. that it should not go for any part. Per two J. Cro. cont. 2 Rol. 315. l. 50. Cro. Car. 391. 396. Jon. 355. R. per tot. Cur. 1650. 2 Rol. 315. l. 40. R. Sal. 552, 553. Per Hale, 1 Mod. 90. Hard. 313.*

So, the probate of a will for things personal, and land, shall not be prohibited in the spiritual court, though the question there be, whether the testator was *compos*? whether the will was revoked? &c. which avoid the whole will; for the determination there will not be evidence in a trial upon the will for the land at the common law. *Cro. Car. 396. 2 Rol. 315. l. 5. 15. 30. 40. Sal. 552. Hard. 191.*

So, the probate of a will of a *feme-covert*, of things in action, or which she

she had as executrix (of which she may make a will), shall not be prohibited in respect of her coverture. Per North, 1 Mod. 211. Per Holt, Sal. 313. 2 East, 552.

[Prohibition lies, if a suit be instituted to obtain a general probate of the will of a woman made during her coverture, though with her husband's consent, and though she survived him; for he could not by any assent enable her to dispose by any will made during the coverture of property which she might acquire after his death, but only of property over which he had a disposing power. 2 East, 552.]

So, if the ecclesiastical court allows a will by an infant of sixteen years; for the consanguinity belongs to them. R. 2 Jon. 210.

(G 17.) Bequest of a legacy.

So, a suit for a legacy shall be properly in the spiritual court; for it is not a debt, but due only by the will; and no prohibition goes. F. N. B. 50. O. 51. H. 53. C. 1 Vent. 233.

Though the legacy be a chattel real; as, a ward, term, &c. F. N. B. 43. F.

So, if a testator devises, that his executor pay a debt to his creditor; it shall be a legacy; for which the creditor shall sue in the spiritual court. F. N. B. 44. B.

Or, 10*l.* in satisfaction of a debt of 5*l.*; for it is a new sum of which no part was due. R. 2 Rol. 284. l. 25.

So, if he devise, that the goods of the parish, which he took by wrong, be re-delivered. F. N. B. 52. E.

If he devise a cow, &c. for repair of the church. F. N. B. 54. A.

So, if he devises so much per ann. in the nature of a rent, to be paid out of a chattel; as, out of his stock. R. 2 Rol. 284. l. 30.

Or, out of the profits of a term for years; for that is a chattel. R. 2 Rol. 285. l. 10.

Or, out of a debt due by A. 2 Rol. 438.

Or, out of the profits of lands (part leasehold and part freehold) for seven years, and afterwards the years elapse, and the devisee of the lands dies before payment; for account does not lie against his executor. R. per four J. Williams dub. 2 Cro. 279.

[An executor may be sued for a legacy in the court where he proves the will, though he does not live in that diocese, and prohibition does not lie. Str. 847.]

But a prohibition goes, if a suit be there upon a devise of lands or tenements. F. N. B. 43. F. R. Pal. 120.

Or, for a legacy devised to be paid out of lands of which he is seised in fee. R. 2 Rol. 284. l. 35.

Though it is to be paid out of land, if there be not personal assets. R. 2 Rol. 284. l. 40. Poph. 58.

Or, to be paid upon a sale of lands. R. 2 Rol. 284. l. 50. Hob. 265.

Or, if a devise be, that land be sold, and the money employed in the payment of legacies. R. 2 Rol. 285. l. 15. Hob. 265. Dy. 151. But cont. per three J. where it was for payment of legacies generally. Dy. 264. b.

So, if a suit be for that which is a legacy in a court of equity only. 2 Rol. 285. l. 32. Hob. 265.

So, if a suit be for the revocation of a guardianship appointed by will, pursuant to the st. 12 Car. 2. 24.; for the temporal court is to determine whether the appointment be pursuant to the statute. R. 1 Vent. 207.

So, if a suit be to have money raised by sale of lands put into the inventory; for by the st. 21 H. 8. 5. it is not accounted goods and chattels of the testator. R. 2 Rol. 285. l. 25. 30.

So, if a bond be given for a legacy; for thereby it becomes a debt. R. Yel. 39. 2 Mod. Ca. 327, 328. Vide ante, (F 5.)

So, a prohibition goes, if the spiritual court proceeds to grant probate of a will, which is not so by the common law; as, of a will of a *feme-covert* made by covenant or agreement of the husband; for it is not properly a will. Per North, 1 Mod. 211. Per Holt, Sal. 313.

If a probate be by a peculiar, where it ought to be by a bishop; or, *à contra*. Per North, 1 Mod. 211.

#### (G 18.) Granting or repealing administration.

So, if a suit be in the spiritual court for the granting or repealing administration, in cases where the temporal law does not disallow it, a prohibition does not go; for it is a matter of spiritual consuance.

So, if administration to A. be repealed, and granted to B., who libels against A. to account to him; a prohibition does not go. R. 2 Rol. 283. l. 10.

But if a suit be for a temerarious administration, and hindering him from making an inventory of the goods, a prohibition goes; for by these means the property of the goods will be there determined. R. 2 Rol. 287. l. 45.

Or, the husband of an administratrix be sued, after the death of his wife, for wasting the goods. R. 2 Rol. 302. l. 32. 40.

So, if a suit be to repeal an administration without cause, after a grant of it, a prohibition goes; for their power is executed. D. Cro. Car. 63. 202. R. 1 Sid. 179. 372. 1 Lev. 186. 305. Ray. 93. Vide Administrator, (B 8.)

Yet, if surprise or collusion in obtaining the grant be suggested, a prohibition does not go. R. F. g. 304.

So, a prohibition shall go, if a suit be for administration from the archbishop, &c. where there are not *bona notabilia*. Per North, 1 Mod. 211.

[But a prohibition is not grantable upon a mere suggestion of the custom, unless such custom has been pleaded in the spiritual court, and the plea has been rejected. R. Ld. R. 609.]

[A prohibition lies to the spiritual court against a suit to obtain probate to the will of one not testable when he made it. 2 East. 552.]

[The spiritual court hath not jurisdiction to decide on an administrative inventory. 3 Bur. 1622.]

[An ecclesiastical court has jurisdiction to cite the next of kin to take out administration, or show cause why he should not, or renounce. 3 M. & S. 411.]

[An ecclesiastical court has power to make one who has intermeddled with the effects of a deceased, come in and account. 3 M. & S. 411.]

(G 19.)

(G 19.) Exhibiting an inventory.

So, the ecclesiastical court may require the exhibiting an inventory of the goods of a testator or intestate, with their true value, within a year.

But if the ecclesiastical court charges the executor or administrator above the value of the goods, because an inventory was not duly exhibited, a prohibition goes. Poph. 58.

(G 20.) Granting of guardianship.

So, the spiritual court may appoint a guardian or curator for the goods of an infant, who has no land. R. 2 Lev. 217.

Which curator may sue there for detaining the infant. Dub. 2 Lev. 219.

But if an infant has a guardian by tenure or will, or otherwise, by the common law, the spiritual court cannot appoint a curator for the infant. 2 Lev. 217.

So, if a libel be, that a curator appointed by the spiritual court, generally, ought to have the custody, a prohibition goes; though in the answer to the suggestion it be insisted only, that the spiritual court shall appoint, where none is appointed by the common law. R. 2 Lev. 217.

And it is sufficient for a prohibition, if it be suggested, that the father has appointed a guardian, without saying how. Per Scrogs, 2 Lev. 219.

(G 21.) Accounting by an executor or administrator.

So, the spiritual court may require an executor, or administrator, to account before them. 1 Rol. 123. 358.

So, the spiritual court may oblige an executor to make distribution to one, of his reasonable part of the goods of the testator, according to the custom of York, though remedy may be by the common law. R. Lev. 128.

(G 22.) The spiritual court, having jurisdiction, shall proceed, though it be contrary to the rules of the common law.

Where the spiritual court has consuance and jurisdiction of the matter, a prohibition shall not be granted, though the proceeding there differs from the rules of the common law; as, if a woman after a divorce *causâ adulterii*, by which the marriage is not dissolved *à vinculo*, sues there, for defamation within their consuance, without her husband. R. 2 Rol. 298. l. 30.

Or, if a *feme-covert* be sued there for an offence within their consuance, without her husband. 2 Rol. 298. l. 40.

So, if a woman sues for a separation *propter scævitiâ*, and upon sentence for the husband, the wife appeals; the husband, at his charge, shall transmit the record. Semb. Cro. Car. 16.

So, if a release of the husband, of a suit or costs, pleaded to a suit by a wife divorced *causâ adulterii*, be disallowed. R. 2 Rol. 301. l. 5.

So, if a suit be for double damages, in not setting out of tythes, against an executor; though an action does not lie by the common law  
against

against an executor, upon the stat. 2 Ed. 6. 13. for the not setting out of tythes by the testator. R. Ray. 95.

If a suit be there by an administrator of an executor against the executor of another, for a legacy by the first testator. R. Ray. 123.

If the executor of an appellant proceeds upon an appeal by his testator; for an appeal does not abate. R. 2 Lev. 6.

If a charge of slander be, that he spoke such words, *vel his similia*. R. 2 Cro. 159.

If they cite a corporation, by the members in their natural capacity. R. Skin. 27.

So, where a thing is merely of spiritual jurisdiction, a prohibition shall not be granted, though proof be disallowed, which would be sufficient for the fact at the common law; as, if a probate of a will for personal estate be disallowed because the proof of it is made only by a single witness. Vide ante, (F 13.) — post, (G 23.)

So, if the probate of a nuncupative will were disallowed, being proved only by one witness. Carth. 143.

(G 23.) So, where it has consuance of the principal, it shall determine that which is incident.

So, if a suit be in the spiritual court for a thing within their consuance, and a temporal matter becomes incident, it shall be determined there, and no prohibition goes. 12 Co. 65. Sti. 10. Carth. 143. [Unless they proceed to try contrary to the course of the common law. Cowp. 424.]

As, if in a suit for tythes, payment be pleaded, and denied; it shall be tried there. R. 2 Rol. 305. l. 55. 1 Rol. 12.

Though the suit be founded upon a *modus decimandi*. 2 Rol. 305. l. 50. Hob. 247.

So, if simony be pleaded, for it may be tried there. R. Cro. El. 642.

So, in a suit for a legacy, if a release be pleaded, it shall be tried there. 2 Rol. 307. l. 10. 1 Rol. 12.

Or, a judgment, and no assets *ultra*, and it be replied, that the recovery was by *covin*. R. Mo. 917.

If to a suit for tythes, an award be pleaded, and denied; it shall be tried there. R. 1 Rol. 12.

So, if a suit be there for repairs of a church, and that by custom the constable ought to collect; a prohibition does not go, if nothing be disallowed which is allowed by the common law. R. Hard. 510.

If in a suit for tythes arising upon his land, the defendant says, that it is the land of another. 1 Sid. 89.

That the land lies in another vill. R. 1 Sid. 89.

If in a suit for tythes, the defendant says, that he agreed with the parson for his life, paying so much per ann. and the plaintiff insists, that for default of payment, the agreement is determined; for the contract is not disputed, but the payment only. R. 2 Rol. 42.

If in a suit for tythes, the defendant says, that he severed them, and permitted the gate to be open for the parson to take them; and the issue be, that the gate was not open. Cro. El. 843, 844.

If a suit be for a way by prescription, for carrying away of tythes, and the defendant says, that the way is in another place. R. Jon. 230,  
If

If a suit be for tythes, and the defendant claims the rectory by feoffment, which is denied; it shall be tried there. 2 Cro. 270.

So, no prohibition goes, though the right be settled by act of parliament, if the proceeding there be conformable to the common law; as, in a suit by a mortgagor for tythes, where the estate, by a private act of parliament, was transferred from the mortgagee to sir W. Juxon, who claimed there *pro interesse suo*; for he is not entitled by the common law to the tythes, till he has recovered by ejectment. R. 2 Lev. 64.

But a prohibition shall go, if the spiritual court proceeds after the thing is discharged by the common law; as, if a suit be for punishment of an offence within their consuance, after a pardon. Vide ante, (F 12. — G 8.)

As, for defamation, after the offence charged by the words is pardoned. R. Mo. 855.

So, if the suit in the spiritual court charges those who are discharged by the common law.

If it charges a defendant with costs in a suit *ex officio*, and not between party and party. Dub. Hard. 503.

Or, charges him only, who is not to be charged alone by the common law; as, if a parson sues a lessee of parcel of a rectory solely, for a portion of tythes payable out of the whole rectory. R. 1 Leo. 11.

So, if a suit in the spiritual court be determined contrary to the right by the common law; as, if a suit be by the executor of A. for a legacy given jointly to A. and B., because the spiritual court does not allow survivorship. R. 2 Lev. 209.

If an award, &c. pleaded be disallowed, when it is good by law. R. 1 Rol. 12.

So, if the spiritual court disallows proof sufficient by the common law; as, proof of payment by one witness. R. Hutt. 22. R. Mo. 909. Per Hale, 1 Vent. 291. 2 Rol. 439. Cro. El. 666. Vide ante, (F 13. — G 22.)

Or, proof of the revocation of a will, by a single witness. Carth. 143.

So, if the spiritual court disallows a plea of *misnomer*, where the defendant is called baronet, when he is only a knight. R. Ray. 219.

But there shall not be a prohibition, upon a suggestion that the defendant had only a single witness, if such proof be not offered in the spiritual court, and refused for the insufficiency of the proof. Carth. 144. R. 2 Cro. 270.

Or, upon a suggestion, that a witness is rejected as not credible, when he would be a good witness by the common law. Carth. 143, 144.

Or, upon a suggestion, that the proceeding there was *ex mero officio*, without a presentment, or proper accusation; for this lies within their consuance; and if they do it, the remedy shall be by appeal. R. 2 Vent. 44.

### (H 1.) Proceedings to obtain a prohibition:—[And herein of the suggestion.]

By the st. 2 (or 2 & 3) Ed. 6. 13. if any sue a prohibition, &c. he shall deliver to the justices of the court a true copy of the libel, &c. under his hand, and under it the suggestion.

And

And before a prohibition granted there ought to be notice to the other party.

And, therefore, it shall not be granted upon motion the last day of term; for it is sufficient to have a rule for cause the first day of the next term. Latch, 7.

So, upon notice, the party upon a surmise shall discharge the suggestion before it is entered upon record. 1 Leo. 11.

[A prohibition cannot be granted upon a suggestion which is false. R. Ld. R. 219. 587.]

Or, the court may discharge the rule for a prohibition *nisi*, &c. without putting the parties to join issue, or demur. 1 Sid. 163.

[If the ecclesiastical court appears clearly to have jurisdiction, and have pronounced sentence, the court will not even grant rule to show cause. 2 B. M. 813.]

[There must be an affidavit, that the copy of the libel is a true one. Barnes, 427.]

[If a civilian cannot be got to argue for it, none shall be heard against it. Barnes, 428.]

So, the suggestion ought to be positive and direct; for if a suggestion, for a prohibition upon a libel for defamatory words, says, that the words, if they were spoken, were all at one time, it is bad; for the words ought to be confessed. 1 Vent. 10. Lut. 1043.

[In a suggestion for a prohibition to the Admiralty Court, it is better to set out the proceedings in the Admiralty Court, than to state them at length. D. 3 T. R. 347.]

[A suggestion ought only to pray a prohibition; it should not contain an award that it be granted. D. 3 T. R. 347.]

So, if a prohibition be to a temporal court, there ought to be a suggestion. R. 1 Lev. 253.

If a prohibition be granted, it ought to be served before a subsequent proceeding to sentence, or appeal. Vide post, (K 1.)

And if it be served, and the judge proceeds afterwards, an attachment goes: and he shall be examined upon interrogatories, and fined for his contempt. 2 Jon. 47.

But if a party be excommunicated for want of an answer after a prohibition granted, yet the prohibition may be served afterwards. 2 Cro. 429.

### (H 2.) When the suggestion ought to be proved.

By the st. 2 (or 2 & 3) Ed. 6. 13. if any sue for a prohibition, he shall deliver to the justices a copy of the libel, and under it the suggestion; and if such suggestion be not proved by two witnesses, in six months following, the plaintiff in the ecclesiastical court, on request, shall have a consultation, double costs, and damages, to be assessed by the court, &c.

The proof ought to be within six calendar months after the teste of the prohibition. Sal. 554.

[If the declaration is ordered to be amended, the time for proving suggestion is computed from amendment. Barnes, 428.]

And by credible witnesses. R. 2 Bul. 154.

But it is sufficient, if proof be made within six months, though it be not recorded till afterwards. R. Noy, 30.

And

And it may be made in the vacation. Noy, 30.

Proof of the suggestion is requisite in all cases, where the matter suggested is merely matter in fact; as, if a *modus* be suggested. Godb. 245, 246. Carth. 463.

Or, a payment, &c. by a lord of a manor for himself and his tenants, for the benefit of the parson. 1 Rol. 3.

And all the suggestion, which goes to the advantage of the parson, ought to be proved. R. 1 Rol. 2. 3.

So, if the suggestion be, that the land was barren heath, improved within seven years. R. Cro. Car. 208. Adm. Dy. 170. b. D. cont. Yel. 102. 119. R. Jon. 231. 2 Shp. 92.

Proof of a suggestion is necessary, where a prohibition is to a suit for tythes prædial or personal, given to the spiritual court by the st. 2 Ed. 6. or to a suit for mixed tythes or oblations, given by the st. 27 H. 8. 20. and 32 H. 8. 7. 2 Inst. 662.

Or, of a suggestion of a discharge by the st. 31 H. 8. Adm. 1 Rol. 55, 56. 2 Rol. 125.

Proof that the plaintiff himself hath paid such a *modus* is sufficient. R. Noy, 28.

Or, that it is the common fame, that there is such a *modus*; or, that he has known it paid. Noy, 28.

So, proof by one witness for part, and by another witness for the other part of the suggestion. D. 1 Vent. 107.

So, proof of so much of the suggestion, as shows a good *modus* to oust the parson, is sufficient; though it varies from the *modus* suggested:

As, if the suggestion be of a *modus* of 4s. and the proof a *modus* of 4s. 6d.; or, two closes, and the proof of only one, &c. R. Mo. 911.

But proof is not necessary, where the suggestion is, that tythes are not due by law; as, where the suit is for tythes of tiles, turf, stone, &c. 2 Inst. 662.

So, if the suggestion be, that the parson leased, or agreed for his tythes. R. Yel. 102. 119.

Or, that they are discharged by award. R. 1 Rol. 55.

So, proof is not necessary, where the suggestion is in the negative; for a negative cannot be proved: as, that a parson is not inducted. 2 Inst. 662.

That the land does not lie in the parish. Ibid.

That the parsonage is not impropriate. Ibid.

So, if a prohibition be prayed upon a discharge by the king's patent, the patent ought to be produced, being upon record. D. 1 Vent. 120.

## (I) Declaration upon a prohibition.

[Leave to declare in prohibition will be granted only when the court inclines to prohibit, not when it inclines to the contrary. 1 Bl. Rep. 81. Doug. 620.]

[The party applying for a prohibition, has no right to insist on declaring, when the court is satisfied that his application is groundless; but the defendant in prohibition may, when the opinion of the court is against him. 1 Bur. 198.]

The declaration in prohibition is founded upon the attachment for a contempt

contempt supposed in him who neglects the writ of prohibition directed to him. 12 Co. 59.

In all cases, where a writ of prohibition is sued, directed to the party, or to the judges, or to both, as it may be, if they proceed afterwards, there shall be an attachment against them. F. N. B. 40. D. usq. K.

And therefore a declaration by the party shall be *qui tam*, &c.; for it supposes a contempt to the king. 12 Co. 61.

So, a declaration, which alleges a prescription for a discharge of tythes, ought to show that the matters, for which the libel is in the spiritual court, are within the prescription; as, if the prescription be, to be discharged for tythes of cattle reared for the plough, it ought to allege that the libel was for tythes of such cattle. R. 1 Rol. 62.

If it prescribes, that all having milch-kine in the parish, and paying nine cheeses, should be discharged of tythes for herbage, &c.; it ought to allege, that the party has milch-kine in the parish. Ibid.

So, the declaration ought to show a place where the defendant proceeded after the prohibition served; otherwise the plaintiff shall not have judgment, though the writ of inquiry finds damages. R. 1 Vent. 348. 350. Ray. 387. 2 Jon. 128. 2 Sho. 145.

But two persons cannot join in a declaration upon a prohibition, where the cause of complaint is several. R. Cro. Car. 162.

So, if the writ of prohibition be against judge and party, who live in several counties, there must be several attachments, and, by consequence, several declarations, though there was but one writ. F. N. B. 40. I.

So, if there were several writs, one against the judge, the other against the party, though they were all in the same county. Ibid.

So, if a libel be against several parishioners, who all insist upon the same *modus*; they cannot join, but must have several prohibitions. R. Ray. 425. R. Yel. 128, 129.

So, if a man alleges a *modus* for discharge of tythes, he need not allege that he has paid the *modus*. R. 1 Rol. 62, 63.

If he alleges payment of the tenth cock for all tythes of barley and rakings involuntarily scattered, he need not say, that they are involuntarily scattered; for it shall come on the other part. R. Cro. El. 702.

So, if there appears cause for a prohibition, there shall not be a consultation, though the declaration be defective for want of form; as, because there is not a profert of a deed, or letters patent. Per Coke, 1 Rol. 332.

Vide more concerning the proceeding in prohibition in Pleader, (3 H).

### (K) Consultation.

#### (K 1.) When it lies.

By the st. *de consult.* 24 Ed. 1. if, on sight of the libel, the justices see the matter belongs to the spiritual judges, they shall write to them to proceed, *regia prohibitionem non obstante*.

And therefore, if upon motion for a prohibition, when a copy of the libel is produced (as it ought to be), it appears that the matter is of spiritual conusance, no prohibition shall go.

Or,

Or, if a prohibition was granted without notice to the other party, and upon motion it appears that there was no cause for it; the court will grant a consultation, without putting him to declare upon the prohibition. Cro. Car. 97.

[Consultation lies, though the refusal of the plea in the spiritual court was not traversed.]

[Though the issues are immaterial.]

[Though no verdict is found as to the contempt.]

[And if judgment is generally for a consultation, whereas the plea was only for two parts, and the libel for two third parts, it is well.]

[If the judgment is, *nil. cap. per billam*, and not *quod le defendant eat sine die*, it is right, if there is also judgment that a writ of consultation be granted; for that is the true judgment. Fort. 350.]

So, after a prohibition granted, if, upon trial, the matter be found for the defendant, generally, a consultation shall go.

[If prohibition is granted on suggestion of a custom, and on issue joined the custom is found, but the court, on motion in arrest of judgment, find the custom ill, a consultation shall go. Str. 1145.]

So, if the matter found for the defendant varies in words, but not in substance, from the suggestion; as, if the suggestion be, that two-thirds of the tythes belong to the plaintiff, and the verdict is, two entire parts of all tythes.

So, if there be a material variance between the suggestion for a prohibition, and the libel in the spiritual court, there ought to be a consultation; for the prohibition ought to be founded upon the libel; as, if the libel be for tythes of corn, and a *modus* be suggested for tythes of hay, upon demurrer to the declaration in prohibition, a consultation shall go. Yel. 79.

So, if there be a variance in the quantity; as, if the libel be for 200 faggots of wood, and the suggestion be as to 20 faggots only. Yel. 79.

So, if after a prohibition granted, it appears that the spiritual court has consuance for part, a consultation shall go *quoad*, &c. 12 Co. 44.

So, if after a prohibition granted, it be not served till sentence and appeal, it cannot be afterwards used. 2 Cro. 429. Vide ante, (H 1.)

### (K 2.) When not.

But a consultation shall not be granted, except in term. R. 12 Co. 41.

Nor, by a judge, but only in court. Ibid.

So, after a declaration upon a prohibition, it shall not be granted upon motion, before plea or demurrer. Cro. Car. 288.

So; a consultation shall not go, where a verdict is found for the defendant, if upon the whole matter it appears that the spiritual court has no consuance; as, if a prohibition be upon a suggestion, that all lands in A. are discharged by a *modus*, and there is a verdict for the defendant, because it is found that all, except ten acres, are within the *modus*; yet a consultation does not go for such mistake in the issue, if the libel was not for tythes of the ten acres. R. 2 Rol. 320. l. 5. 15. Hob. 192.

So, if the suggestion was of unity, *ratione cujus* he shall be discharged, and a verdict finds that he shall not be discharged *ratione inde*; though it be against the plaintiff, yet being impertinent, for the fact to be tried was,

was, whether there was an unity, &c. ; a consultation does not go. R. 2 Rol. 320. l. 35. 11 Co. 15.

So, though there be an immaterial variance between the suggestion and the libel, a consultation does not go ; as, if the suggestion be for a total discharge upon the st. 31 H. 8. and recites the libel to be for twenty faggots, where it was for 200 ; for it is not material for what quantity the libel was, when the plaintiff claims a discharge for the whole. R. Yel. 79.

So, if the suggestion varies in quantity from the libel, if it be conformable to the copy of the libel delivered by the spiritual court, this variance shall not be a ground for a consultation. 2 Rol. 329. l. 45.

[So, if plaintiff in prohibition declares, that there is a custom for the occupiers of his tenement to pay 5s. in lieu of tythe of corn and hay, which *modus* the parson has always accepted, and verdict for plaintiff, there shall be no consultation ; for the *modus* is found, though it is described as a custom, when strictly it should have been a prescription. B. R. H. 292.]

### (K 3.) No prohibition after a consultation.

By the st. 50 Ed. 3. 4. no prohibition shall go after a consultation, unless the libel be engrossed, enlarged, or otherwise changed.

And therefore, regularly, where a consultation was awarded upon the merits, the party shall not have another prohibition upon the same suggestion.

Though he appeals, and then prays another prohibition. R. Poph. 159. R. Latch, 6. R. Mo. 917. 1 Rol. 378.

Though the consultation be granted by another court. R. Cro. El. 277.

Though he varies the *modus*, upon which the former prohibition was had. R. 1 Rol. 378.

### (K 4.) Except where the consultation was upon matter of form ; and other instances.

But if a consultation was awarded for want of form in the suggestion or proceeding thereon, another prohibition may be allowed. Cro. Car. 208.

As, if the consultation was awarded for want of proof of the suggestion within six months. R. Yel. 102. R. Cro. Car. 208. R. Jon. 231. R. Carth. 463. In another suit for the same matter, but not in the same suit. Mo. 917.

If after a consultation for want of proving his suggestion, the party appeals, there may be another prohibition to the court, to which the appeal was, upon the same suggestion. 2 Rol. 500.

So, if after a consultation the libel is enlarged or changed ; as, if the former libel was, that tythes had been paid time whereof, &c. and afterwards it is added, that though the prior, &c. were discharged, yet for twenty, thirty, or forty years, and time whereof, &c. tythes were paid. 2 Rol. 207.

So, if a consultation goes for a collateral matter ; as, if the plaintiff was nonsuited.

So, if the suggestion was for a *modus* of tythe of lambs in a particular farm, and thereon a consultation goes ; another prohibition shall

go upon a suggestion of the same *modus* in the whole parish. Semb. [Cont. — The case cited is here reversed. The first suggestion was as to the parish, and the second to the particular farm.] 2 Vent. 47.

So, if consultation goes, and there be afterwards a new libel for the same species of tythes in another year; a prohibition shall go upon the same suggestion as was tried before. Adm. Yel. 102.

So, if a consultation goes, and the party against whom appeals; the appellee may have a prohibition, though the appellant cannot have it. R. Poph. 159.

So, if after a consultation, the plaintiff pleads the same matter (which was suggested, and found against him at common law) in the spiritual court, which is accepted, and proceeds there for trial, the former defendant may have a new prohibition; for they cannot try in the spiritual court a matter determined by a trial at common law, which was proper to be there tried; as if a discharge within the st. 31 H. 8. was suggested. R. 2 Rol. 319. l. 45. Hob. 286.

### **Prohibition to the admiralty.**

Vide ADMIRALTY, (F 2, &c.)

### **Prohibition of waste.**

Vide WASTE, (A 1.)

## **PROMISE.**

Vide ACTION UPON THE CASE UPON ASSUMPSIT. — TEMPS, (G 18.)

## **PROMISSORY NOTE.**

Vide ACTION UPON THE CASE UPON ASSUMPSIT, (A 2.) — MERCHANT, (F 15, &c.)

## **PROMOTER.**

Vide INFORMATION.

## **PROMULGATION OF A LAW.**

Vide PARLIAMENT, (G 23.)

## **PROPERTY.**

(A) The original of property. *infra*.

(B) How property is vested or divested. p. 178.

(A) The original of property.

*Jus in res inferioris naturæ Deus humano generi indivisim contulit, hinc factum, quod quisque in suas usus arripuit, sui proprium devenit.*  
Grotius de Jure Belli et Pacis, l. 2. c. 2. s. 2.

**(B) How property is vested or divested.**

The property of goods vests in another by succession, grant, sale, caption, &c. Vide **BIENS**, (D 1, &c. — E).

So, if a man pledges goods to another, he has a special property. Vide **MORTGAGE**.

So, if a man forfeits his goods, the property is thereby altered; as, after a condemnation and proclamation in the exchequer of goods as forfeited, the former owner cannot maintain trespass, or *trover* for them. R. Ray. 336.

**In what things a man has a property.**

Vide **BIENS** (F — G 1. 2. — H.)

Vide **ACTION UPON THE CASE, PER TOTUM**. — **CHARTERS**, (A). — **JUSTICES**, (O 7.) — **MARKET** (E). — **PLEADER**, (2 S 8. — 3 M 9. 17. 39.) — **TRESPASS**, (B 4.)

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**PROROGATION.**

Vide **PARLIAMENT**, (O 1. 2.)

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**PROTECTION.**

Vide **ABATEMENT** (F 11.)

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**PROTEST.**

Vide **MERCHANT**, (F 8, &c.)

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**PROTESTATION.**

Vide **PLEADER**, (N).

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**PROTHONOTARY.**

Vide **COURTS**, (C 4.)

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**PROVISION.**

Vide **PROVISOR**.

**Provision for a wife.**

Vide **CHANCERY**, (2 M 12, 13, 14. — 3 E 1, 2. — 3 Z 1, &c.)

**Provision for children.**

Vide **CHANCERY**, (3 Z 4. — 4 H 2.)

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**PROVISO.**

Vide **CONDITION**, (A 2.)

PRO-

## PROVISOR.

### (A) Provision.

(A 1.) How usurped. *infra*.

(A 2.) How restrained. *infra*.

### (A) Provision.

(A 1.) How usurped.

In the time of H. 1. the pope usurped the donation to bishoprics, and all other ecclesiastical benefices. Dav. 90. a. Vide Popery.

And by a can. in the synod of London *anno* 1107, with the king's assent, it was decreed, *quod nunquam per donationem baculi pastoralis aut annuli, quisquam per regem, aut aliam laicam manum investiretur in Anglia*. Dav. 90.

And in the time of John, the pope granted a general bull of provision for all the benefices in the kingdom. Dav. 94. a.

So, in the time of Ed. 2. Dav. 95. b.

And in the minority of Ed. 3. the pope, by his bull, made an alien cardinal in England, and gave him power to provide for all ecclesiastical promotions, *cum vacare acciderint*. Dav. 95. b.

(A 2.) How restrained.

But, by the st. 25 Ed. 1. (which was the first statute against provisors) it was declared a contempt of the crown, to bring in bulls of provision, &c. Dav. 95. b.

By the st. 25 Ed. 3. st. 6. (in which the former act is recited) the king and his subjects shall have the right of patronage; election of prelates shall be made according to the antient grants of the king; and no bull of provision shall be put in execution: but the provisor shall be attached, fined, and ransomed at the will of the king, and imprisoned till he renounce the benefit of his bull, gives satisfaction to the party grieved, and sureties that he will not afterwards offend. Dav. 86. b.

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## PROVOCATION.

Vide JUSTICES, (M 9. 15.)

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## PROXY.

Vide PARLIAMENT, (D 19.)

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## PUBLICATION.

### Publication of depositions.

Vide CHANCERY, (Q).

### Publication of a libel.

Vide LIBEL, (B 1. 2.)

**Publication of slander.**

Vide ACTION UPON THE CASE FOR DEFAMATION, (G 4.)

**Publication of a will.**

Vide DEVISE, (E 2, &c.)

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**PUIS DARREIN CONTINUANCE.**

[And therein of insisting upon facts arisen, *puis darrein continuance*, though not by way of plea *puis darrein continuance*.]

Vide ABATEMENT, (I 24.)

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**PURCHASE, AND PURCHASER.**

Vide CAPACITY, (A 1. 2. — B 1, &c.) — CHANCERY, (I 1. 4. — H 3. — 4 I 1, &c.) — DISCENT. (B). — ENFANT, (B 1.) — FRANCHISES, (F 15, &c.)

**Purchasing a title.**

Vide MAINTENANCE, (A 5.)

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**PURLIEU.**

Vide CHASE, (I 1. 2.)

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**PURPRESTURE.**

**(A) What shall be.**

Purpresture is derived from the word *pourpris*, which signifies an inclosure. Co. L. 277. b.

Purpresture is when a man, by building, inclosure, or unlawful using of any liberty, encroaches upon an highway, public river, or any demesne or land of the king, or another. Co. L. 277. b. Manw. 172. 176. Nom. verb. Pourpresture.

If a man builds an house upon his own soil, or the waste in a forest, it will be *purpresture*, and may be pulled down, or he may be fined at the discretion of the justices of the forest. R. Dy. 240. b.

So, if he erects a beacon there. R. Dy. 240. b. in marg.

Or, makes a causeway there. Ibid.

If the erection be upon the king's manor. Jon. 277.

If *purpresture* be by erection of cottages, &c. upon a forest within the king's manor; though the king grants the manor to A. it shall not be a dispensation of the *purpresture*; but it shall be pulled down in the hand of the patentee. R. Jon. 277.

Vide Chase, (L.)

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**PURVEYANCE.**

Vide PRÆROGATIVE, (D 41, 42.)

[QUAKER.]

### [QUAKER.]

[A Quaker's testimony on his affirmation, is admissible in debt on a penal statute. Cowp. 382.]

[The affirmation of a Quaker cannot be read in support of a criminal charge. 2 Burr. 1117.]

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### QUALE JUS.

#### (A.) When it lies.

A recovery by default, though made by collusion, was not an alienation in *mortmain*, contrary to the st. Mag. Ch. 36. or st. de Religiosis, 7 Ed. 1. 2 Inst. 429.

And, therefore, by the st. W. 2., 13 Ed. 1. 32., it was enacted, that after judgment by default at the suit of an ecclesiastical person, *inquiratur per patriam, utrum petens habeat jus, vel non*; if found that he had right, *recuperet seisinam*, &c.; if he had no right, *incurratur domino feodi*, &c.

And by this statute, where an ecclesiastical person recovers by default, a writ of *quale jus* issues.

And this writ ought to issue regularly after the default and before judgment. 2 Inst. 430.

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### QUALIFICATION.

Vide *ESGLISE*, (N 8, 9.)

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### QUARENTINE.

#### The writ *de quarentinā habendā*.

By the st. M. Ch. 9 H. 5. 7. a wife shall have quarantine for forty days in the capital messuage of her husband, if it be not a castle. Vide *Dower*, (A 11.)

And if she be ousted, she shall have a writ *de quarentinā habendā*, which is *viscontiel*, and a commission to the sheriff to proceed thereon. F. N. B. 161. E.

And thereupon the sheriff shall make process immediately against the party, to answer in two or three days, and need not stay till the county court. F. N. B. 162. A.

[It seems that none are liable to the penalties in the eighth sect., st. 26. Geo. 3. c. 6. (relative to the performance of quarantine, q. v.) but the captain, seamen, and passengers; not persons going on board ships arriving from infected places. 4 Taunt. 202.]

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### QUARE CLAUSUM FREGIT.

Vide *PLEADER*, (3 M 34, &c.)—*TRESPASS*, (B 1.—C 1,—D).

N 3

QUARE

## QUARE EJECTIT INFRA TERMINUM.

(A) ~~When~~ it lies. *infra*.

(B) ~~How~~ the proceeding shall be. *infra*.

(C) ~~When~~ this writ lies, or an ejectment. *infra*.

(A) ~~When~~ it lies.

If a lessor enters upon his lessee for years, and enfeoffs another in fee, or for life, &c. the lessee shall have against him a writ of *quare ejecit infra terminum*, and shall recover his term and damages. F. N. B. 197. S.

Or, if the term be determined, shall recover his damages. F. N. B. 197. T.

So, if the heir of the lessor enters, and makes a feoffment to another, &c. F. N. B. 198. C.

Or, the lord by escheat. Semb. F. N. B. 198. F.

So, if the lessee be ousted, and his lessor disseised by a stranger, and the lessor afterwards releases to the disseisor. F. N. B. 198. H.

So, if the lessor suffers a common recovery against him, though the lessee could not falsify such a recovery before the st. 21 H. 8. 15. F. N. B. 198. E.

So, if a lessee assigns his term, his assignee may have the writ of *quare ejecit infra terminum*. F. N. B. 198. D.

Or, against the survivor of four lessors, where the survivor alone enters, and makes a feoffment. Ibid.

So, the lessee of a villein, who purchases, and makes a lease before the entry of his lord. F. N. B. 198. G.

(B) ~~How~~ the proceeding shall be.

A *quare ejecit infra terminum* lies against the feoffee, &c. or against the lessor. F. N. B. 197. S. 198. K.

And though the writ supposes a sale to the feoffee, &c. yet the sale is not traversable, but the ejectment only. F. N. B. 198. K.

The process is summons, attachment, and distress infinite. F. N. B. 197. V.

But no process lies to outlawry, because the writ is not *vi et armis*. Ibid.

This writ was founded upon the st. W. 2. 24. which gives a writ *in consimili casu*; and because an ejectment does not lie by a lessee against the feoffee of his lessor, without entry, for that the lessor ousts him, and not his feoffee, this writ was contrived upon this statute to be brought against the feoffee, &c. F. N. B. 198. A.

(C) ~~When~~ this writ lies, or an ejectment.

But if the lessee after ouster and feoffment by his lessor enters, and the feoffee ousts him, the lessee may maintain an ejectment against the feoffee. F. N. B. 198. A.

So, if the feoffee be party or privy to the ouster by the lessor. Ibid.

So, a lessee, ousted by his lessor, may have an ejectment, or writ of *ejecit infra terminum* against him, or his heir, at the election of the lessee. F. N. B. 198. K.

So,

So, against the lord by escheat, or lord of a villein, who leased to him; and that without a precedent entry. F. N. B. 198. K.

Vide Ejectment.

## QUARE IMPEDIT.

(A) What remedy for a church. *infra*.

(B 1.) Right of advowson. *infra*.

(B 2.) How the proceeding in it shall be:—The count, &c. p. 184.

(C) Assize of darrein presentment.

(C 1.) When it lies. p. 184.

(C 2.) When not. p. 185.

(C 3.) How the proceeding shall be. p. 185.

(D) Quare impedit:—When it lies. p. 185.

(E) Juris utrum:—When it lies. p. 186.

### (A) What remedy for a church.

Remedy by law was provided for the recovery of a church, or for the revenues of a church.

By the common law, there were three writs for the church itself, viz. right of advowson, *quare impedit*, and assize of *darrein presentment*. 2 Inst. 357.

For the revenues of the church, the parson had remedy for his lands and tenements by *juris utrum*.

### (B 1.) Right of advowson.

By the common law, in all cases where the church was full by institution against a common person, or by institution and induction against the king, the rightful patron would lose the advowson, if he did not recover the inheritance of it by a writ of right of advowson. R. 6 Co. 49. 2 Inst. 357, 358. Vide Advowson.

Though the presentation upon which the church was full, was made by usurpation. Vide Eglise, (H 14.)

Though the patron was an infant, *feme-covert*, &c. 6 Co. 49.

But in all these cases the patron seised of the advowson in fee, may have remedy by the writ of right of advowson. F. N. B. 30. B. F.

So, before the st. *de donis*, 13 Ed. 1. a patron, who had a fee-simple conditional, if he was ousted of the advowson by usurpation, should have had a right of advowson.

So, if he who had a right to collate, was ousted by a plenarty upon a collation without title, he should have had a writ of right. 6 Co. 50. a.

So, a right of advowson lies for the advowson of a vicarage, prebend, chapelry, &c. as well as of a church. F. N. B. 31. C. E.

So, if a parson, who sues in the spiritual court for tythes to the fourth part of the advowson in value, be prohibited by an *indicavit*, his patron shall afterwards have a right of advowson. F. N. B. 30. E.

So, it lies of a moiety, or third, or fourth part of a church. F. N. B. 30. D.

~~And~~ <sup>But</sup> by common law, of a less part: but that is now ousted by st. W. 2. 5. F. N. B. 30. E.

~~So~~ <sup>But</sup>, if A. and B. are seised of an advowson, and to the heirs of B., they may join in a right of advowson for the benefit of him who has the fee. F. N. B. 30. F.

But a right of advowson does not lie by a tenant for life or years. F. N. B. 30. B.

Nor, by tenant by the curtesy, or in dower. Ibid.

Nor, by tenant in tail since the st. *de donis*, though he has a fee expectant. Ibid.

So, if a man had purchased an advowson, to which he had never presented, he should not have had a right of advowson before the st. W. 2. 5.; but his advowson was lost. 2 Inst. §58.

### (B 2.) How the proceeding in it shall be:—The count, &c.

In a right of advowson, the process shall be summons and *grand cape*. Vide Pleader, (3 I 1, &c.)

And the summons shall be made upon the glebe, which shall be seised into the king's hands upon the *grand cape*. N. N. 69. c.

The plaintiff shall count of the possession of an ancestor, or his own possession. F. N. B. 30. B.

And ought to lay the *esplees* in the parson, in taking tythes, oblations, &c. Ibid.

The tenant shall come and make defence. F. N. B. 30. C.

And shall have a view of the church. N. N. 70. a.

So, he may join the *mise* by battle, or the *grand assise*. F. N. B. 30. C.

But in the case of the king, the tenant cannot tender a demy-mark, to enquire of the seisin alleged by the king in his count, as he may in the case of a common person. F. N. B. 31. D.

So, final judgment shall not be against the king, though the *mise* was joined between the king and the tenant. Ibid.

### (C) Assise of darrein presentment.

#### (C 1.) When it lies.

An assise of *darrein presentment* lies, where a man, or his ancestor, has presented to a church, and, upon a subsequent avoidance, another usurps upon him.

So, by the st. W. 2. 5. the heir, or he in reversion, shall not be prejudiced by a presentation by his guardian, or by tenant in dower, by curtesy, for life, or for years, or by the donee in tail, but that he may have such action possessory at his full age, or when the reversion comes into possession, as his ancestor might have had upon the last presentation in his time.

So, he shall have this writ, though the last presentation was made by tenant by the curtesy, in dower, for life, or for years; if those estates did not commence by the grant of the plaintiff himself. F. N. B. 31. G.

So, if a guardian made the last presentation in right of the plaintiff, then in his wardship. F. N. B. 31. I.

Or,

Or, a stranger, by usurpation upon the plaintiff, then an infant. F. N. B. 31. I.

Or, a stranger, by usurpation in time of war, though the plaintiff was of full age. Ibid.

(C 2.) When not.

But an assise of *darrein presentment* does not lie by one coparcenor against another. F. N. B. 32. A.

Nor, if tenant for life, or for years, claims by lease from the plaintiff himself. F. N. B. 31. I.

Or, if an infant purchases an advowson, and an usurpation be made upon him. Ibid.

Or, if an usurpation be upon a *feme-covert*, who purchased the advowson. 2 Inst. 360.

So, if a purchaser be a bishop, abbot, &c. 2 Inst. 358.

(C 3.) How the proceeding shall be.

The proceeding in an assise of *darrein presentment* is conformable, in many respects, to the proceeding in an assise of *novel disseisin*.

By the st. M. Ch. 13. it shall be *coram just. de Banco*; though before it lay in B. R. 2 Inst. 27.

So, plenarty is no bar in an assise of *darrein presentment*, any more than in a *quare impedit*. if it was not for six months before the writ purchased, by the st. W. 2. 5. 2 Inst. 360.

(D) *Quare impedit*:—When it lies.

[A *quare impedit* may be brought for a church and an hospital. Willes, 608.]

*Quare impedit* is an antient writ, which lies by him, who, being in possession of an advowson of a church, is disturbed in his presentation to it. 2 Inst. 356. Vide Pleader, (3 I 1, &c.)

[If the right of nomination be in one, and of presentation in another, then, if either impede the other in his right, a *quare impedit* lies. 3 T. R. 646.]

So, by the st. W. 2. 13 Ed. 1. 5. if any, not having right, present during the minority of an infant, in the time of tenant in dower, by the curtesy, for life, for years, in the time of tenant in tail, &c. the infant at full age, he in reversion, and the issue in tail, may have the same remedy for recovering the possession of the advowson, as his last ancestor, &c. might have had in his time. The same remedy is for a *feme-covert*, or men of religion, if the usurpation be during coverture, or vacation. 2 Inst. 353.

And, therefore, an infant, who has an advowson by descent, after his full age shall have a *quare impedit* or *darrein presentment*, though the usurpation was upon him during his minority. 2 Inst. 358, 359.

So, an infant may have it during his minority, when he is out of wardship. 2 Inst. 359.

So, an infant shall have a *quare impedit*, if an usurpation be upon him, though his ancestor purchased, and never presented to the advowson. 2 Inst. 359.

So,

So, the heir of him in reversion, after an usurpation in the time of tenant by the curtesy, in dower, for life, for years, tenant by statute-merchant, staple, or *elegit*. 2 Inst. 359. Jon. 48.

So, the issue in tail, after an usurpation in the life of tenant in tail. 2 Inst. 359. Jon. 49.

So, the successor of him in reversion, if an usurpation be upon the lessee, &c. of an ecclesiastical person. Semb. Jon. 48.

But if an infant purchases an advowson, and an usurpation be upon him, he is not within this statute. 2 Inst. 358.

So, the lessor himself is not within the statute, though the heir is, when the usurpation is upon his lessee, &c. 2 Inst. 359.

Nor, a man in remainder, or his heir. Ibid.

So, a *feme-covert* shall not have aid by this statute, if an usurpation be, during the coverture, to an advowson purchased by her. Jon. 49.

So, if an usurpation be upon a bishop, or other ecclesiastical person, his successor shall not have a *quare impedit*; for the statute aids only upon an usurpation in the vacation, or when the ancestor could not have remedy at the time of the usurpation. Semb. Jon. 47. 49. F. N. B. 34. M.

[Declaration in *quare impedit* amended on motion. 2 Wils. 118.]

[In *quare impedit* there is no general issue. 3 T. R. 158.]

[A defendant obtaining judgment on demurrer in *quare impedit*, is not entitled to costs. 1 H. Bl. 530.]

Vide *Quare non admisit* — Pleader, (3 I 1, &c.)

### (E) *Juris utrum* :—When it lies.

A *juris utrum* is the highest writ which a parson can have. F. N. B. 48. R.

And it lies where the lands and tenements of a rectory are aliened by the predecessor of the parson. Ibid.

Or, are recovered against the predecessor by verdict, or by confession or default, without praying in aid of the patron and ordinary, F. N. B. 48. R. 49.

So, if the predecessor be disseised of his lands or tenements. F. N. B. 49. A.

Or, any intrudes upon them after the death of the predecessor. Ibid.

So, an abbot, prior, &c. being *parson imparsonne* of a church, shall have a *juris utrum*. F. N. B. 49. E.

So, a dean and chapter, prebendary, vicar, &c. F. N. B. 49. M. N. O.

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### QUARE INCUMBRAVIT.

(A) When it lies. p. 187.

(B) How the proceedings shall be. p. 187.

(C) When it does not lie. p. 188.

(A) When

(A) When it lies.

If the plaintiff, in a *quare impedit*, sues a *ne admittas* within six months, and afterwards recovers, and before judgment the bishop had instituted another to the church, he shall have a *quare incumbravit* against the bishop, and shall recover his presentation and his damages. F. N. B. 48. I. O.

So, every party, who sues a *ne admittas*, may have a *quare incumbravit* after his recovery, if the church be full by the presentation of another.

Though the bishop admits the presentee of him, who is found patron by a *jure patronatus*. F. N. B. 48. H.

Or, if the bishop admits the clerk of a stranger, as well as of the party to the writ. F. N. B. 48. L.

Or, admits after six months, as well as before. F. N. B. 48. L.

Though the bishop presents the clerk of the plaintiff. N. N. 111. b.

So, a *quare incumbravit* lies, if the bishop incumbers, when no *quare impedit* is pending, and no debate for the church. N. N. 111. a.

Or, before judgment given. N. N. 111. b.

(B) How the proceedings shall be.

The *quare incumbravit* is an original writ, which issues out of chancery, and not out of the court where the recovery was. F. N. B. 48. G.

And it ought to be sued in the county where the church is. F. N. B. 48. D.

And in the court where the recovery was, if the record remains there. F. N. B. 48. F.

But the king may sue a *quare incumbravit* in B. R. though the recovery was in C. B. F. N. B. 48. E.

So, a common person, if the record be removed there by error. F. N. B. 48. F.

The process shall be an *alias*, and then a *distringas*. F. N. B. 48. P.

The plaintiff in a *quare incumbravit* ought to mention his recovery in his writ and count. *Per meliorem opinionem*. F. N. B. 48. K.

Or, if there be no recovery, he may have a special count. N. N. 111. a.

The defendant may demand *oyer* of the recovery mentioned in the count. N. N. 111. b.

The defendant may plead that he did not incumber since the prohibition delivered. F. N. B. 48. N.

But the plaintiff in his count need not say where he recovered, N. N. 111. b. 112. b.

Or, whether he recovered since or before the six months. N. N. 111. b.

Or, that the bishop refused his clerk; for if he incumbered, it imports it.

If the plaintiff be nonsuit, he may have another *quare incumbravit*. and vary his count. F. N. B. 48. M.

(C) When

## QUARE NON ADMISIT.

## (C) When it does not lie.

But none shall have a *quare incumbavit*, except after a recovery in a court. F. N. B. 48. E.

Nor, if a church be incumbered before a *ne admittas* sued. F. N. B. 48. H.

So, a *quare incumbavit* does not lie, if the bishop after the six months collates by lapse. F. N. B. 48. L. N. N. 112. a.

So a *quare incumbavit* does not lie, if the bishop incumbers, pending a right of advowson, though the plaintiff recovers; for the plaintiff in a right of advowson cannot have a *ne admittas*; for he recovers the advowson only, and not the presentation. F. N. B. 48. Q.

## QUARE NON ADMISIT.

## (A) When it lies.

After a recovery in a *quare impedit*, if the bishop refuses to admit the clerk of the plaintiff, he shall have an *alias*, *pluries*, and attachment, or at his election a writ of *quare non admisit*; in which he shall recover damages only for the refusal. F. N. B. 47. C. G.

And it lies upon a recovery by the king, as well as by a common person. F. N. B. 47. C. D.

And it may be sued out of chancery. F. N. B. 47. C.

Or, out of C. B. which, in term, is most proper. F. N. B. 47. C.

And it lies against a bishop, upon a refusal by his vicar-general. F. N. B. 47. I.

So, upon his refusal, though he afterwards admits him. F. N. B. 47. L.

So, it lies against the guardian of the spiritualties upon a refusal by the bishop then dead. F. N. B. 47. I. Q.

Or, against the official of the bishop. F. N. B. 47. N.

A *quare non admisit* shall be sued in the county where the refusal was. F. N. B. 47. F.

And by a common person in B.; or, if the judgment be affirmed in error, in B. R. F. N. B. 47. E.

But by the king it may be in B. R. as well as in C. B., though no error brought. F. N. B. 47. D.

The writ ought to recite the recovery. F. N. B. 47. C.

But it will be a good plea for the bishop, that the church is litigious. F. N. B. 48. B.

That the church is full of another presentation by any one not party to the record. F. N. B. 47. K.

That he himself presented by lapse. F. N. B. 47. M.

That he has admitted his clerk. F. N. B. 47. H.

So, it does not lie against an archdeacon for refusal of induction; for the plaintiff shall cite him into the spiritual court, or have an action upon the case. F. N. B. 47. H.

Nor, upon a recovery of a presentation to a donative; for he shall have a writ to the sheriff to put him into possession. F. N. B. 48. A.

Or,

Or, a writ to him who ought to instal, &c. the presentee to the donative, to put him into possession. F. N. B. 48. C.

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## QUARE OBSTRUXIT.

### (A) The writ of quare obstruxit.

A *quare obstruxit* is a writ which lies against him who obstructs the plaintiff's way, to which he has a right in the land of another. *Nom. verb. Qu. Obstruxit.*

And it lies in the nature of a writ of right close directed to the lord or bailiffs of a manor of antient demesne. F. N. B. 11. I. L.

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## QUARTER SESSIONS.

Vide JUSTICES OF PEACE, (D 2, &c.)

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## QUAY.

[A public quay, like a public highway, is common to all the community. 8 T. R. 606.]

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## QUE EST EADEM.

Vide PLEADER, (E 31.)

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## QUEEN.

Vide ACTION, (B 2.—C 2.)—JUSTICES, (K 1, &c.)—ROY, (F 1, 2, 3.)

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## QUE ESTATE.

Vide PLEADER, (E 23, 24.)—TEMPS, (G 13.)

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## QUEM REDDITUM REDDIT.

Vide FINE, (F.)

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## QUESTION.

Vide PARLIAMENT, (G 25, &c.)

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## QUIA DOMINUS REMISIT CURIAM.

Vide DROIT, (C 2.)

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## QUID JURIS CLAMAT.

Vide FINE, (F.)

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QUIETUS.

## QUOD PERMITTAT.

## QUIETUS.

When an accountant in the exchequer is acquitted, he shall have his *quietus*.

As to a sheriff's *quietus*, vide Viscount, (G 4.)

## QUI TAM, &amp;c.

Vide ACTION UPON STATUTE, (E 1, &c.)—INFORMATION, (A 3.)

## QUIT-RENT.

Vide RENT, (C 2.)

## QUOD EI DEFORCEAT.

## (A) When it lies.

## (A 1.) By the common law.

By the custom of some places a *quod ei deforcat* lies at common law; as, in Wales. 2 Inst. 350. R. Jon. 381.

So, by the common law, if a recovery was against the husband in a real action by render of the husband, his wife might recover her dower. 2 Inst. 349.

Yet, in the superior courts no *quod ei deforcat* lies by the common law. 2 Inst. 350. Jon. 381.

## (A 2.) By the st. W. 2. 4.

But now by the st. W. 2. 4. if a recovery be against the husband by default, his wife shall have a *quod ei deforcat*; and if the tenant cannot show that he had a right to the tenement at the time of the recovery, the wife shall have her dower. Vide 2 Inst. 349.

## QUOD PERMITTAT.

(A) When it lies. *infra*.

## (B) By whom it lies. p. 191.

## (C) When it does not lie. p. 191.

## (D) How the proceeding in it shall be.

(D 1.) By justices in the county. p. 191.

(D 2.) By writ in C. B. p. 191.

(D 3.) The process. p. 191.

## (A) When it lies.

A *quod permittat* lies against him who disturbs another in his right to common of pasture, turbary, piscary, aqueduct, way, fair, market, or other privilege. F. N. B. 123. F. H.

As,

As, for disturbing in his estovers. F. N. B. 123. H.

Or, disturbing the villeins of a lord in doing suit at his mill, where they ought to do it by prescription. F. N. B. 123. M.

Or, disturbing in having water to his fountain, where he ought to have it. F. N. B. 124. A.

Or, in his passage *ultra aquam*. Ibid.

In his free foldage. Ibid.

In the erection of ladders in the soil of another, for repairing an house contiguous. Ibid.

In his corody. Ibid.

So, a *quod permittat* lies for abating a nuisance in the freehold of another. F. N. B. 124. H. Vide, Action upon the Case for a Nuisance, (D 2.)

(B) *By whom it lies.*

A *quod permittat* lies upon a disturbance, or *disseisin* to the plaintiff, or his ancestor; but in no other degree. F. N. B. 123. H.

And when it is brought upon a *disseisin* to the ancestor, it is in the nature of a *mort d'ancestor*. F. N. B. 123. K.

So, an abbot, &c. might have had it upon a *disseisin* to his predecessor. F. N. B. 123. H. L.

A *quod permittat* lies by tenant in fee, or in tail. F. N. B. 124. B. C.

So, it lies by the heir, or feoffee of him to whom a nuisance is done. F. N. B. 124. H. 125. A.

So, a *quod permittat* lies against the heir, or feoffee of him who did a nuisance to the freehold of another, if the nuisance be continued. F. N. B. 124. H. 125. A.

(C) *When it does not lie.*

But a *quod permittat* does not lie for reasonable *estovers* in a wood, &c. for which an assise of *novel disseisin* is given by the st. W. 2. 26. F. N. B. 124. A.

(D) *How the proceeding in it shall be.*

(D 1.) *By justices in the county.*

A *quod permittat* is *vicontiel* before the sheriff by justices in his county-court; or it may be sued in C. B. F. N. B. 123. G.

(D 2.) *By writ in C. B.*

A *quod permittat* by writ in C. B. lies against a disseisor, or disturber of his common way, &c. upon a *disseisin* to the plaintiff himself, or his ancestor. F. N. B. 123. H.

If the common be in the land of a person certain, he need not mention in his writ the number of cattle. F. N. B. 123. G.

(D 3.) *The process.*

The process in a *quod permittat* is summons, attachment, and *distingas*. F. N. B. 124. F.

And if *nil* be returned upon the summons, a *capias* shall go. F. N. B. 124. F.

QUO

## QUO WARRANTO.

## QUO JURE.

## (A) When it lies.

A *quo jure* is a writ of right in its nature, and lies by the lord of a vill, or of a waste, or by any seised in fee, against him who claims common in his land. F. N. B. 128.

## (B) How the proceeding shall be.

The process in a *quo jure* is summons, attachment, and distress. F. N. B. 128. L.

And if the defendant makes default after appearance, the grand distress shall go instead of a *petit cape*. F. N. B. 128. L.

The defendant shall make his defence, shall make title to the common, shall allege seisin of it, and the *esplees*, and *quod tale sit jus suum offert*, &c. as the demandant does in a writ of right. F. N. B. 128. I.

To the title alleged by the defendant, the plaintiff shall make defence, and shall defend against the seisin alleged by the defendant, and shall join the *mise* upon the mere right, or by battle. F. N. B. 128. L.

## QUO WARRANTO.

(A) When it lies. *infra*.

## (B) When not. p. 194.

## (C) The proceeding in a Quo Warranto.

(C 1.) In what court it shall be. p. 195.

[(C 2. a.) *Preliminis*.] p. 195.

[(C 2. b.) Application for.] p. 196.

(C 2. c.) What process. p. 196.

[(C 2. d.) Mode of conducting it.] p. 197.

[(C 2. e.) Quashing it.] p. 197.

(C 3.) Information. p. 197.

(C 4.) Plea, &c. p. 199.

(C 5.) Judgment. p. 202.

(C 6.) The effect of the judgment. p. 203.

(C 7.) Execution. p. 204.

## (A) When it lies.

A *quo warranto* is in the nature of a writ of right for the king, against him who usurps or claims any franchises, or liberties, to say by what authority he claims them. 2 Inst. 282. 9 Co. 28. a. Yel. 191.

So, the king may have an information in the nature of a *quo warranto*.

Or, a writ of inquiry out of the exchequer. Co. Ent. 530. b.

A *quo warranto* lies for all franchises.

As, for waifs, estrays, &c. Co. Ent. 528. 541. 544.

Goods and chattels of felons, deodands, &c. Co. Ent. 528. 549.

Fines, amerciaments, issues, &c. Co. Ent. 551. b. 561. a.

A park, warren, &c. Co. Ent. 561.

So, for wreck of the sea, &c. 2 Rol. 205. l. 35.

Or,

Or, for taking lastage or ballastage of ships. 1 Sid. 86.

So, it lies for franchises, which cannot be seized into the king's hands; for the party may be ousted of them.

As, for a court-baron. Quo. W. 14. Treby's argument. Per three J. two dub. 2 Cro. 259. Yel. 190.

A court-leet, or borough-court. Co. Ent. 527. b. 544.

A fair, market, toll, &c. Co. Ent. 527. b. 544. 561. a.

[Information in the nature of *quo warranto* lies against any one claiming an exclusive ferry over a public river, but not for taking money of passengers. Str. 161.]

So, it lies for claiming to be a corporation. Co. Ent. 527. b.

To choose bailiffs, or other officers. Co. Ent. 527. b. 537. b.

Coroner, constable, clerk of a market, justice, &c. Co. Ent. 528. a. 537. b. 551. b.

[For exercising the office of steward of a court-leet; Semb. 3 T. R. 598. but not of a court-baron. Str. 621.]

[It lies for the office of constable. Str. 1213.]

So, it lies upon a claim of exemptions; as, to be exempt from the government of the mayor, justices, &c. Co. Ent. 528. a.

So, a *quo warranto* lies against him who abuses his franchises, or liberties. 2 Inst. 496. 2 T. R. 567.

So, it lies upon a claim of the correction of others; as, to have the assize of bread and beer, weights or measures. Co. Ent. 528. a.

To have a prison, power of arresting, &c. Ibid.

Punishment of forestallers, or other offenders. Ibid.

Pillory, tumbrel, &c. Co. Ent. 551. b.

[It lies where any new jurisdiction, or public trust, is executed without authority, though it is no usurpation upon any franchise of the crown. Str. 299. 836. Ld. Raym. 1559.]

[An information in nature of *quo warranto*, shall be granted where the right is doubtful and disputed, in order to try it, unless there has been such an acquiescence as ought to prevent it. 3 Burr. 1485.]

[The rule, that an information in nature of *quo warranto* will not be granted at the instance of those who have concurred in the defendant's election, only holds where they knew of the defect which rendered it invalid; not, therefore, where it arises from the defendant's not having taken the sacrament within one year before his election as required by stat. 13 Car. 2. c. 1. since that defect is a latent one. 3 T. R. 573.]

[An information in nature of a *quo warranto*, the effect of which will be to dissolve the corporation, will not be refused because the relator attended the election in question, and others at which the defendant afterwards presided, unless it likewise can be presumed that he purposely delayed until the dissolution of the corporation became unavoidable. 3 East. 213.]

[The election of a portreeve of a borough and manor, who, as portreeve, is returning-officer of the borough, may be the subject of an information in nature of *quo warranto*, and perhaps though he is not also returning-officer. 3 T. R. 596.]

[An information in nature of *quo warranto* lies for claiming to vote in virtue of a burgage tenement. 3 T. R. 599.]

[An information in nature of *quo warranto* lies for the office of bailiff of a borough and manor, who, being a prescriptive officer and member

of the court-leet, has power to summon and select the jury; for such discretionary power is a material and important function in the administration of justice. 2 East. 308.]

[The court are bound to grant an information in nature of *quo warranto*, where the grounds are, the defendants having omitted to take the sacrament within one year previous to his election. 3 T. R. 574.]

[A swearing in, though defective, is a sufficient user. 4 East, 337.]

[Information in nature of *quo warranto* will be granted where the right depends upon a matter of doubtful law, that it may be finally settled. Cowp. 58.]

[Where a doubt is raised on the affidavits for and against an information in nature of *quo warranto*, it will be granted, though the evidence preponderates against the relator, since the jury are the only judges between conflicting testimony. 3 T. R. 596.]

[Where an application for an information in nature of *quo warranto*, is made to enforce a general act of parliament, it is no objection that the party applying is not a member of the corporation; as where the grounds are, that the defendant had not taken the sacrament within one year previous to his election. 3 T. R. 574.]

[A title to one office, which is a qualification to hold another office, is not within stat. 3. of 32 Geo. 3. c. 58. respecting derivative titles, and, therefore, although the party has exercised the first for six years, the court will make the rule *nisi* for an information in nature of *quo warranto*, for exercising the second office, upon a defect of title to the first, absolute. 2 M. & S. 71.]

### (B) When not.

But, by the st. 18 Ed. 1. of *quo warranto*, every one who had a franchise before the time of R. 1., and can prove his enjoyment afterwards, by verdict, or other means, his franchise, &c. shall be confirmed.

And therefore, if it appears upon a *quo warranto*, that the defendant has enjoyed time whereof, &c. franchises, &c. which lie in prescription, or those which lie in charter, by grant within the time of R. 1.; or, if granted before, if they be confirmed or allowed since, he shall not be ousted of them. 2 Inst. 495. 9 Co. 28.

[It does not lie for erecting a warren. Str. 637. 2 Ld. Raym. 1409.]

[It does not lie for a forfeiture by non-attendance. Str. 819.]

[The court will not grant information *quo warranto* for making a rabbit-warren, nor for setting up a fair: the remedy is, by application to attorney-general, who may grant it. B. R. H. 261.]

[Nor, for holding a court-leet in a manor; for it is a private right, and may be had in a civil action. Andr. 14.]

[Nor, where two sets of churchwardens are sworn in. Str. 1196.]

[An information in nature of *quo warranto* will not lie for encouraging the exercise of a franchise. 3 Burr. 1812. 1 Blk. 579.]

[An information in nature of *quo warranto*, will not be granted to a corporator, who, though he did not concur in the defective election, afterwards acquiesced therein; the circumstance of his not opposing the parties' subsequent election to a necessary annual office, and then attending official meetings at which he presided, is not an acquiescence. 1 East, 38.]

[An

[An information in the nature of *quo warranto*, will be refused to a mere stranger who has no concern with the corporation. 1 East, 46.]

[An information in nature of *quo warranto*, will only lie for what are usurpations on the rights or prerogatives of the crown. 4 T. R. 381.]

[An information in nature of *quo warranto*, does not lie for the office of church-warden. 4 T. R. 381.]

[If circumstances are very strong in favour of a corporate franchise, and against the application for an information *quo warranto*, the rule nisi will be discharged, and with costs. 4 Burr. 1963.]

[An information in nature, &c., will not be granted against a member of a corporation now dissolved, for continuing the exercise of his office. 3 East, 119.]

[To found a *quo warranto* information, there must have been a possession or exercise of the office in question; a mere claim thereto, as a tender to be sworn in, is not sufficient. 5 T. R. 85.]

[The court will not decide the validity of the election of a corporation, if the question is new or doubtful, on a rule to show cause for an information in nature of *quo warranto*. Dougl. 397.]

[An information in nature of a *quo warranto*, does not lie for a corporator whose title (or, where derivative, when the original title) is no better than the title questioned, and who therefore has himself no title if his objection prevails. 6 T. R. 503.]

[Information in nature of a *quo warranto*, will not be granted after six years' possession. 4 T. R. 282. etiam stat. 32 Geo. 3. c. 58.]

[Nor, where the defect of defendant's title is stale, as of twenty-nine years' standing, and has never been questioned before. 1 B. M. 433. Or, within twenty years. Cowp. 59. Dougl. 81. (3 T. R. 310.) 4 Burr. 2523. 1 T. R. 3.]

[But possession of a corporate franchise for less than twenty years, is not of itself a sufficient objection to an information in the nature of *quo warranto*, to try the validity of a title to such franchise. 2 Term Rep. 767.]

### (C) The proceeding in a *quo warranto*.

#### (C 1.) In what court it shall be.

By the st. made 6 Ed. 1. (but proclaimed 30 Ed. 1. and therefore printed of that year, 2 Inst. 279.) all persons ought to enjoy their franchises, if not usurped over, till the coming of the king or justices in eyre.

And thereby, and by the st. 18. Ed. 1. when justices in eyre were in being, a *quo warranto* lay before them. 2 Inst. 498.

#### [(C 2. a.) Preliminaries.]

[A corporator must be disfranchised by the corporation for non-residence, before an information in nature of *quo warranto* can be applied for; as, where by the constitution, the corporator, by removing from the borough, vacates his office. It would be productive of inconvenience to hold that non-residence is, *ipso facto*, a disfranchisement. 2 T. R. 772.]

## [(C 2. b.) Application for.]

[In support of an information in nature of a *quo warranto*, the relator may use the affidavit of those who have concurred in the defendant's election. 4 T. R. 223.]

[An information in nature of *quo warranto*, will not be granted after a lapse of twelve years, upon an affidavit of belief only, which is contradicted by entries in the corporation books. 3 T. R. 310.]

[An affidavit in support of an information in nature of *quo warranto*, must state the mode of election to the office in question. 3 T. R. 596.]

[An affidavit in support of an application for an information, in nature of *quo warranto*, for usurping the corporate office, contrary to the provisions of a particular charter, must state that such charter has been accepted, or, whence the same thing may be inferred, been acted upon. It must appear that the constitution alleged to have been violated, is an existing one. 4 M. & S. 253.]

[If the affidavits in support of an information in nature of *quo warranto*, be deficient in the statement of necessary facts, recourse may be had to the affidavits, in answer, in which they are detailed. 3 T. R. 596.]

[Where the merits of the election, if any, are sufficiently brought into question by the affidavits, and where it is not denied by the defendant; an information in nature, &c. will be granted, though the fact of the election is not precisely sworn to. 2 East, 177.]

[An affidavit in support of an application for an information in nature of *quo warranto*, cannot be amended. 4 M. & S. 253.]

[A rule *nisi* is obtained in Trinity term, against several for an information in nature of *quo warranto*, for usurping corporate offices. Between Trinity and Michaelmas term they resign, and their resignations are accepted. Held, that the rule must be made absolute, this circumstance of the resignation being no answer to it, though it might regulate the discretion of the court in imposing the fine. 2 M. & S. 75.]

[The stat. of 33 Geo. 3. c. 58. which passed for the quieting the possessions of persons who had exercised franchises, and for preventing others from lying by for a length of time, with latent objections to their titles, enables a defendant to an information in the nature of *quo warranto*, to plead that he held or executed the office six years before the exhibiting of the information. This period must be dated from the making the rule absolute, and not from the time of obtaining the rule *nisi*: hence, a rule *nisi*, for such an information, will be discharged, if it appears that the defendant is in a condition to plead the statute; to make it absolute would be nugatory. 2 M. & S. 71.]

[Whether, where the original ground of application in nature of, &c. fails, it will be granted for the trial of an incidental and secondary question. 4 East, 327.]

## (C 2. c.) What process.

By the st. 6 Ed. 1. (printed 30 Ed. 1.) the sheriff shall make proclamation forty days before the eyre, that all appear to show *quo warranto* they claim their franchises; and if any makes default, his franchise shall be seised into the king's hands, till he appears, *nomine districtionis*, and then replevied, if he answer immediately; if he ex-

cepts, that he ought not to answer without an original, it shall be inquired, whether he himself usurped; and if found so, he shall answer immediately without an original; if he found that his ancestor died seised of the franchise, an original shall be sued in this form: *Rex, &c. sum per bonos summonitores A. quod sit, &c. ostensurus quo warranto tenet, &c.*

If A. appears upon the original he shall answer, and replication and rejoinder shall be made. By the same statute.

If he does not appear, nor is essoined, it shall be as in eyre. By the same statute.

And therefore, the first process against the defendant in a *quo warranto* is summons. 1 Sid. 86.

If he does not appear thereon, judgment shall be for seizure. 1 Sid. 86. 2 Rol. 46.

So, in an information in the nature of a *quo warranto*, the first process shall be a *venire facias*. Co. Ent. 527. b. 1 Sid. 86.

If the party does not appear the same term, he shall lose his franchise for ever. 2 Inst. 282.

If he does not appear upon the *venire facias*, there shall be a *distringas*. 1 Sid. 86. 1 Sal. 374.

If he appears, his franchises shall be replevied of right. 2 Inst. 282.

If an information be against a corporation, the first process shall be summons, and afterwards *distringas in infinitum*. Carth. 503.

And fifteen days are sufficient between the *teste* and return. R. Carth. 503.

And if there be no appearance upon the *distringas*, the issues may be estreated. R. Carth. 503.

So, upon an inquisition returned into the exchequer of an usurpation of franchises, a *distringas* shall issue against the usurper, who thereupon may appear and plead. Co. Ent. 531.

If an usurpation be by a corporation, process shall be against them by their corporate name. Q. W. 16. Treby's argument. Vide post. (C 3.)

If it be for usurping to be a corporation, it shall be against the natural persons who usurp, or by a name which comprehends them. Q. War. 415. Treby's argument. — Quo W. 69. Pollexfen's argument. Vide post. (C 3.)

### [(C 2. d.) Mode of conducting it.]

[After an information in nature of *quo warranto*, has been granted, the court will not interfere to control the manner of conducting it; therefore, having granted one for claiming to be common councilman, they refused to strike out or direct a *nolle prosequi* to be entered to a replication controverting the defendant's title as freeman, which he had pleaded as introductory to that of common councilman. 4 T. R. 276.]

### [(C 2. e.) Quashing it.]

[A *quo warranto* information cannot be quashed on motion, though both parties consent. 4 Burr. 2297.]

### (C 3.) Information.

The general proceeding is by information for the king, by his attorney.

torney-general, against any usurper of franchises, &c. to show *quo warranto* he uses them. Co. Ent. 527. b.

So, against him who exercises a power unlawfully; as, if a mayor, &c. admits to freedom persons who have no right; for there is no other remedy. 1 Sal. 374.

[And even after twenty years' quiet possession, the king may prosecute by his attorney-general. 1 Term Rep. 8.]

By the st. 9 Ann. 20. an information in the nature of a *quo warranto*, may be granted by leave of court, at the relation of any desiring to sue, against any, who intrudes into, usurps, unlawfully holds, or executes any offices, or franchises of a corporation.

[The practice in informations in nature of *quo warranto*, is, for the parties upon whose affidavits the rule for the information is obtained, afterwards to make such person as they think fit relator; so that the relator is *prima facie* to be considered as the real prosecutor; an application, therefore, that the prosecutor may give security for costs on account of his poverty, will be dismissed; *aliter*, had it shown that he was only an instrument in the hands of others. 2 M. & S. 346.]

[Information on this statute lies not against a corporation as a body, but only against individuals usurping franchises in a corporation. Information against a corporation is always by the attorney-general. 2 B. M. 869.]

[And these informations are no longer granted as of course; but the court will consider all the circumstances of the case before they disturb the peace of corporations. 1 Term Rep. 3.]

And where the rights of several persons may be properly tried in one information, the court may order one against several.

[One information only may, by leave of the court, be exhibited under the Irish stat. 19 Geo. 2. c. 2. s. 4. against the same persons for usurping different franchises. And there is no occasion to state such leave on the record. Cowp. 489.]

[There must be separate informations against several for usurping separate offices of the same corporation, in order to enable each defendant to disclaim, the offence not being joint. Though one only may be tried, and the rest suspended upon an undertaking of the other parties to disclaim according to the event of the trial. The court, therefore, will not consolidate them. 2 M. & S. 75.]

[An information against persons by the name of the mayor and citizens of C. for claiming to be a body corporate, imports not that they are a corporation, but the contrary. 2 T. R. 515.]

[After rules are made absolute for four informations against four defendants, the court may direct that there shall be only one information against all the four defendants. 1 B. M. 573.]

If an information be for using a franchise by a corporation, it ought to be against the corporation. 2 Rol. 115.

If for usurping to be a corporation, it ought to be against the particular persons. 2 Rol. 115.

[If it does not appear whether a court, at which election was made, was competent or not, the court will grant information; or where any other material points are doubtful. 3 B. M. 1485.]

[Whether B. R. can grant it on the application of a private person, for usurping a market upon the crown. 3 B. M. 1812.]

[The

[The court will not grant it on oath of belief of non-residence, defendant swearing to his residence, and paying scot and lot; and the rule may be discharged with costs. 4 B. M. 1963. 2024.]

[The defendant having prior connections with a borough town, previous to his election to the office of bailiff, for which residence is a necessary qualification, took a house at first for four years; but afterwards, at his landlord's request, for one, and slept there one night before the election, and did not return for near a month, when he stayed two days, but retained possession of his house under his lease the whole time; the taking of the house appearing to the court to be *bond fide*, was holden a sufficient legal residence to satisfy the qualification required. 5 T. R. 466.]

[An information was granted in order to try whether a residence in a borough, previous to an election, which required residence, were *bond fide* or not: it appearing that the defendant, though in treaty for a house in the borough, had only hired lodgings there, and had resided there a very few nights in his journey to and from other places. 6 T. R. 560.]

[The court will not grant it if the informant hath acquiesced in the usurpation, and is partaker of the guilt, or shows no right of himself or others, which depends on invalidating defendant's title, or the objection cured by long subsequent conduct, or the consequence prove fatal to the corporation, which has been drawn into acts by the informant which he would now turn to their destruction. 4 B. M. 2022. 2120. 1 Term Rep. 3, 4.]

[And the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved, by impeaching the defendant's title, and the title of those who claim under him, will govern the discretion of the court, in refusing such an application. 2 Term Rep. 767.]

[An application for an information made on the affidavits of several persons, of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avow himself to be the relator. 4 T. R. 223.]

[The court will not permit a corporator to file an information against another for a defect of title, which equally applies to his own, or to the title of those under whom he claims. 6 T. R. 503.]

[After the death of a mayor, the court will not grant an information to impeach a derivative title, where the mayor died in the undisturbed possession of it. 1 Term Rep. 4. *Quære*.]

[The court will not grant an information to impeach a derivative title, if the person claiming the original title has been in the undisturbed possession of his office six years. 4 T. R. 684.]

[The court will not decide the validity of the election of a corporator, if the question be new or doubtful, on a rule to show cause for an information in the nature of a *quo warranto*. Doug. 397.]

#### (C 4.) Plea, &c.

By the st. 9 Ann. 20. the defendant shall plead the same term the information is exhibited by that statute, unless the court gives further time.

[The time of pleading to informations in nature of *quo warranto*, is regulated

regulated thus: after the defendant has appeared, two four-day rules to plead must be given; at the expiration of the last, a peremptory rule to plead may be moved for; the defendant has till the next term. 6 T. R. 594.]

And the defendant may disclaim the liberties mentioned in the information. Co. Ent. 527. b.

Or, disclaim as to part, and justify as to other part. Co. Ent. 529. b.

After plea, the defendant may amend his plea, paying costs, before demurrer joined. 1 Sid. 54.

[A plea to an information in nature of *quo warranto*, may be amended after argument of a demurrer thereto. 4 T. R. 608.]

[At any time before trial, the court will give leave to defendant to withdraw his plea, and plead *de novo* on terms. 4 B. M. 2147.]

[The defendant, in an information in nature of *quo warranto*, is entitled under stat. 32 Geo. 3. c. 58. to plead several pleas, although the limitation of time does not form one of them. 8 T. R. 467.]

[Double pleading in an information in nature of *quo warranto*, is only permitted where the defendant is a corporate officer. 9 East, 469.]

So, the defendant in a *quo warranto* may by plea show his title to the liberties claimed.

And in such case he ought to show a full title to himself. 9 Co. 24. b. R. 2 Leo. 28. Hard. 456.

As, if the king grants *bona feloniam*, or other franchises, which lie in charter, to an abbot, &c. whose possessions come back to the crown, and the king re-grants *bona feloniam*, &c. *adeo plene prout abbas habuit*; in a *quo warranto* against the grantee, the defendant ought by his plea to show the first grant to the abbot, the re-union in the crown, and afterwards the re-grant, &c. R. 9 Co. 26. a. Per Popham, two J. cont. Mo. 297.

If he pleads the king's charter, he ought not to plead that he granted and confirmed; for that is double. 1 Sid. 86.

If he pleads a grant of an office, he ought to show it to be an ancient office. Semb. 1 Sid. 86.

He ought to allege the thing done to be appurtenant to his office. 1 Sid. 86.

If he pleads a grant to an abbot, &c. he ought to show for what estate. R. Mo. 297.

If he shows a privilege to him as a copyholder, he ought to plead it in him who has the freehold at least. R. Yel. 191.

But it is sufficient, that the plea be as general as the information; as, if a *quo warranto* be for using a market, toll, &c. it is sufficient to make title to the market, toll, &c. without saying how much the toll was. Pal. 81.

If he claims a franchise as appendant to a manor which came to the king by the attainder of B., and afterwards was granted to him; it is sufficient to say that B. *fuit debito modo attinctus*. Semb. 3 Leo. 72.

So, if he claims franchises by prescription, and others by charter, he may conclude *eo warranto utitur* generally; for it shall be taken *dis-tributive*. R. Mo. 398.

[By a new charter, the election to an office in the corporation was to be made in the mode in use at a particular period in former times. A plea

plea to an information in nature of *quo warranto*, for exercising the office, claiming it under an election pursuant to the charter, must show what mode of election was at the named period, in what way soever it originated. 4 T. R. 608.]

[In an information in nature of *quo warranto*, the defendant pleaded a charter in corporation, whence it appeared that on the office which the defendant was accused of usurping, namely, that of mayor, becoming vacant by the death of another mayor, was to be elected after a prescribed form: the defendant then pleaded, that on such a day the office of mayor became vacant, not stating by what accident it became vacant, and showed that he was elected in the form prescribed. Held, that the plea was bad, since, for any thing that appeared, the vacancy happened from some other cause than the death of the mayor; and also, for any thing that appeared, there was to be a different mode of election where the vacancy happened not by death, than in the case where it did. Had the defendant averred that there was no provision in the charter for filling up the office of mayor in any instance, but that of a vacancy by death, this might have raised a presumption, that in instances not named there was to be an election in the mode which is prescribed in the instances which were named; but the want of such a negative allegation precluded the court from raising such a presumption. 2 M. & S. 583.]

[A prosecutor in a *quo warranto* information, or in an information in nature of a *quo warranto*, is allowed to reply specially, and to put as many matters in issue as he pleases; but the new matter introduced in the replication ought to be consistent with the matter contained in the plea. 4 T. R. 419.]

[By the constitution of a corporation there are to be, *inter alios*, one mayor and eleven aldermen; on the vacancy of the mayoralty, the burgesses are to nominate two of the aldermen as for the mayor, and the residue of the aldermen, of whom the late mayor (being an alderman) was to be one; or the major part of them, are to choose one of the two. In an information in nature of *quo warranto* against the defendant, for usurping the office of mayor, he pleaded that on such a day the office of mayor was vacant, that himself and one J. S. were nominated, and that himself was elected by the residue of the aldermen. The replication to the plea affirmed, that only five aldermen were present. The defendant demurred. Judgment was given for the crown. For the defendant had not shown how the office of mayor became vacant, and no presumption could be formed that the vacancy was occasioned by an accident, which prevented the late mayor from voting as one of the aldermen, for instance, by the accident of death or forfeiture. The inference then was, that he formed one of the "residue of the aldermen." Five, then, were not a majority; and the replication therefore, if unanswered, is an answer to the plea. The defendant, therefore, should, as he might have done, rejoined, by stating circumstances to show, that five, in the then state of corporation, constituted a majority. 2 M. & S. 583.]

[If the affidavit annexed to a plea in abatement has no title, the plea shall be set aside. Str. 1161.]

[In *quo warranto* against particular members, the title of other members *de facto* cannot be discussed. Cowp. 508.]

[And

[And where the right of election is in freemen in their corporate capacity, the question, Whether they were duly chosen or not? is not to be tried at the election of a third person. Cowp. 507.]

[Where a voter is in possession, the rights of the electors cannot be discussed in a trial of the rights of the elected, at least without notice. Cowp. 509.]

[To prove the existence of an aggregate corporation consisting of different incorporated trades, entries of admission into the several trades are admissible evidence. Doug. 374.]

### (C 5.) Judgment.

In a *quo warranto*, there shall be judgment immediately for the king, if the defendant disclaims. Co. Ent. 527. b.

If the king cannot have the franchise claimed, judgment shall be that the defendant be ousted of it. Co. Ent. 527. b. 530. Per Holt, Sho. 280. 4 Mod. 58. 2 Mod. Ca. 234. 2 Cro. 260.

So, in an information for using an authority to which he has no right. 1 Sal. 374.

If a franchise, or liberty, which may subsist in the crown, be forfeited, the judgment in a *quo warranto* for it, either for seising or ousting, will be proper. Per Holt, Sho. 280.

If the franchise was created by the king, and may subsist, &c. the judgment for seizure will be the most proper. Sho. 280.

So, judgment shall be, for seizure of the franchise into the king's hands, in a *quo warranto* for a franchise not granted by the king. 1 Sal. 374.

If judgment be for seizure of the franchise, all franchises incident, or subordinate, granted by the same charter, are also forfeited. R. Pal. 82.

So, by the st. 9 Ann. 20. if the defendant, on information pursuant to that statute, be found guilty of usurpation, intrusion into, unlawful holding, or executing any offices or franchises there named, the court may give judgment of *ouster* as well as fine, and costs shall be recovered on either side.

If the defendant be found duly elected, but not sworn into the office, there shall be judgment of *ouster*. 8 Mod. 234. Str. 582. 3 Bro. P. C. 173. J. C.

[The stating that the defendant, who was elected to an office, had tendered himself to be sworn into it, is insufficient. 5 Term Rep. 85.]

And no *mandamus* lies to swear, till that judgment be reversed. 11 Geo. 1. 8 Mod. 234.

[There must be an user as well as a claim of a franchise in order to found an application for an information in nature of *quo warranto*, for the judgment is, that he shall be fined *pro usu et usurpatione*. Say. 245. Bull. Ni. Pri. 211.]

So, if the attorney-general confesses the defendant's plea, there shall be judgment for the allowance of the franchises. Co. Ent. 535. b. 537. a. 549. 564.

But, a confession by the attorney-general does not bind the king, where the matter is not private, but concerns the public. 1 Rol. 112.

So, a confession by the attorney-general, if it be not after a plea  
upon

upon record, does not warrant the court to give judgment against the king. Semb. Sav. 19.

So, a confession by the attorney-general does not conclude the king, or the court, in a point of law; but only as to the fact. R. 2 Bul. 296.

[If defendant confesses usurpation for part of the time only, and from thence insists on election, there cannot be judgment of *ouster*, but only *capiatur pro fine*. Str. 953.]

[If a mayor suffers judgment to go against him by default, though his whole expenses are offered to be paid, whereby the rights of others are affected, judgment may be set aside, and another person admitted to defend in his name, indemnifying him. 4 B. M. 2277.]

[The defendant must show a title, nor need the king traverse any thing but the title set up; if one material issue is found for the crown, the crown must have judgment. 4 B. M. 2143.]

[If a defendant, upon an information in nature of *quo warranto*, fails in the title he sets up, judgment must be for the crown. 4 Burr. 2143.]

[Semb, that if the title to a corporate office is only defective from an irregular swearing in the judgment against the party in an information, in nature of *quo warranto*, should be a judgment of *capiatur pro fine* for the temporary usurpation, or a judgment of *quosque*, and not a general judgment of *ouster*. 2 East, 75. 9 East, 246.]

[One who had judgment of complete *ouster* against him, upon a disclaimer generally, in an information in nature of *quo warranto*, is precluded from afterwards setting up his original right; though he was sworn in subsequent to the judgment, under a peremptory *mandamus*; for a *mandamus* to swear in, confers no title. 2 East, 75. Id. 85. as to the last point.]

[On a judgment for the relation in an information in the nature of a *quo warranto*, he is entitled to costs. 1 Anst. 178.]

[There is no analogy between informations in nature of *quo warranto* and civil proceedings. The rule of K. B. therefore in civil suits, that a plaintiff is entitled to the costs of those issues only which are found for him, does not govern in these; touching which the rule, founded on uniform practice, is, that the prosecutor succeeding on one issue only, and having judgment of *ouster* thereon, is entitled to the costs of all the issues. 1 T. R. 453.]

[The word "places," in the stat. 9 Ann. c. 20. means places of the same kind with those before enumerated, to which alone, therefore, the provisions of the act extend. Hence, under the 5th section, the court cannot award costs to the relator, in an information in nature of *quo warranto*, for usurping the office of constable, the same not being a borough or corporate office. 5 T. R. 375. 381.]

### (C 6.) The effect of the judgment.

The judgment in a *quo warranto* is final; for it is in the nature of a writ of right. 1 Sid. 86.

And, therefore, if judgment be against the king, the king shall be forever bound, as to the thing adjudged. 1 Rol. 112.

So, if judgment be against the king upon a confession by the attorney-general, it shall never afterwards be re-examined for a matter in fact; for as to the fact, it is conclusive, though not as to the law. Hard. 129.

But,

## QUO WARRANTO.

But, upon a judgment against a corporation for seizing of their liberties, the corporation shall not be seised or dissolved. 4 Mod. 58.

And there cannot be judgment against a corporation but in their politic capacity. 4 Mod. 58.

### (C 7.) Execution.

After judgment for seizure of liberties into the king's hands, a writ of seizure shall issue to the sheriff. Co. Ent. 539. b.

And thereon the sheriff shall return a seizure. Co. Ent. 540. b.

[A defendant in execution under a writ on a *quo warranto* information, as well for the contempt as for the relator's costs indorsed thereon, is not entitled to his discharge on payment of the fine only. 4 T. R. 809.]

## [RANSOM.]

[A purchase by the owner, in a neutral country, of his ship condemned there as prize by an enemy, is illegal as a ransom. 8 T. R. 268.]

[An action does not lie on a bill of exchange given to the plaintiff for money advanced by him for the express purpose of effecting a ransom contrary to stat. 45 Geo. 3. c. 72. 3 Taunt. 6.]

[The property in a ransom bill, secreted and not delivered up to the recaptor, is not divested by the recapture of the vessel with the hostage and ransom bill on board. Dougl. 641.]

[An action was maintainable by an alien on a ransom bill. 9 Bur. 1734. 1 Blk. 563. See now 22 Geo. 3. c. 25. 45 Geo. 3. c. 72.]

## RAPE.

Vide APPEAL, (A 3.) — JUSTICES, (S 2. — Y 12.)

## RATIONABILIBUS DIVISIS.

Vide DROIT (L).

## RAVISHMENT OF WARD.

Vide GUARDIAN, (H 3.)

## RAZURE.

Vide ABATEMENT, (H 1.) — AMENDMENT, (T 6.) — FAIT, (F 1.)

## READING.

Reading a deed.

Vide FAIT, (B 2.)

Reading

**Reading a bill.**

Vide PARLIAMENT, (G 12. 14, 15.)

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**REBELLION.**

**Commission of Rebellion.**

Vide CHANCERY, (D 5.)

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**REBUTTER.**

Vide GARRANTY, (K 3.) — PLEADER (K).

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**RECAPTION.**

Vide PLEADER, (S K 32.)

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**RECEIPT.**

**(A) Receipt; when allowed.**

- (A 1.) Of a termor for years. p. 205.
- (A 2.) Of him in reversion or remainder. p. 206.
- (A 3.) Of a wife upon - default of her husband.  
p. 206.

**(B) How the proceeding shall be upon a receipt.**

- (B 1.) If the wife be received. p. 207.
- (B 2.) If he in the reversion. p. 207.
- (B 3.) How the party shall plead. p. 207.
- (B 4.) Judgment by or against tenant by receipt.  
p. 207.

**(A) Receipt; when allowed.**

- (A 1.) Of a termor for years.

Receipt is, when, in an action between others, a stranger prays to be received to defend his right, or interest.

As, by the st. Gloc. 11. (which is the first statute which gives receipt) 2 Inst. 323. if the tenant of the freehold is impleaded by collusion to oust a termor of his term, he, before judgment, may challenge his term.

And therefore, where the tenant of the freehold makes default, or renders the land, or says nothing, he who has a term by deed, may pray to be received to defend his interest. 2 Inst. 323

So,

So, tenant by statute-merchant, staple, *elegit*, &c. 2 Inst. 323.

So, if the tenant vouches A. who enters into warranty, and afterwards makes default. 2 Inst. 324.

So, a tenant for years may be received in dower; though the writ be against him and another. R. 3 Leo. 168.

And therefore, he who prays to be received before judgment, suggests a collusion between the plaintiff and defendant. Rob. Ent. 253. R. that it ought to be suggested; but all, except Anderson, agreed, that it is not traversable. R. 3 Leo. 168-9.

But a tenant for years shall not be received upon the st. of Gloc. 11. for faint pleading of him who has the freehold. 2 Inst. 323.

### (A 2.) Of him in reversion or remainder.

So, by the common law, if tenant for life, or years, by collusion, and to the fraud of him in reversion, permitted himself to be impleaded, and would not vouch him, as he might, he in reversion, without being vouched, might appear and enter into warranty, for defence of his right. 2 Inst. 344.

And now by the st. W. 2. 3. if tenant in dower, by courtesy, for life, or in tail, makes default, the heir, or he in reversion, shall be admitted to answer, if he comes before judgment. 2 Inst. 345.

So, if a lease be to A. and B., and upon a *præcipe* against A. alone, he makes default, he in reversion shall be received. 2 Inst. 345.

So, though there be a *mesne* estate for life between the tenant who makes default, and him in reversion. 2 Inst. 346.

So, if the reversion be granted for life to B., who does not pray to be received, the reversioner in fee may. 2 Inst. 346.

So, if the tenant surrenders to him in reversion, though he has not properly a reversion, he shall be received. 2 Inst. 346.

So, he shall be received, where the tenant pleads *nil dicit*, or departs in despite of the court. 2 Inst. 346.

So, if the tenant be only of a rent, by equity, the reversioner shall be received. 2 Inst. 346.

So, by the st. 13 R. 2. 17. he in reversion who prays to be received, shall find surety of the issues of the lands in demand.

But the king cannot be received; for he cannot be a tenant, or *in loco tenentis*. 2 Inst. 346.

Nor, he in reversion after an estate-tail general, or special; for the statute shall be understood of tenant in tail after possibility only, 2 Inst. 345. 1 And. 133. 4 Leo. 51.

So, a reversion ought to be vested in him; for a condition, or possibility, is not sufficient. 2 Inst. 345.

So, regularly, a reversioner shall not be received, where no reversion is in him at the time. 2 Inst. 346.

So, if the tenant prays in aid of him in reversion, who refuses, he shall not be afterwards received. 2 Inst. 345.

### (A 3.) Of a wife upon default of her husband.

So, by the st. W. 2. 3. if the husband be absent, or will not defend, or will render against the will of his wife, *si uxor venerit ante iudicium parata petenti respondere et jus suum defendere admittatur*.

And

And therefore, in a real action against husband and wife, if the husband by default, or reddition, loses the estate of the wife, she shall be received. 2 Inst. 343.

So, upon a *nient dedire*, or *nil dicit* by the husband. 2 Inst. 343.

So, upon faint pleading by the husband. Cont. per Prisot. R. acc. 8 E. 2. Cont. per Coke, 2 Inst. 343. (Acc. Cro. El. 826.)

So, if the husband makes default at the assizes, though judgment is not given upon his default without a trial. R. 2 Leo. 9.

So, upon a default by the husband to the *petit cape*. 1 And. 18.

So, if the husband pleads falsely; as, non-tenure. R. Cro. El. 826.

And it is not a good counterplea, that the husband and wife, after default, levied a fine to a stranger. R. 1 And. 18.

But if the wife be not impleaded with her husband, the wife shall not be received. R. Mo. 242. 1 Leo. 86.

Yet, he in remainder, or reversion, may be received and plead joint-tenancy, &c. in abatement. R. Mo. 242. 1 Leo. 86.

### (B) How the proceeding shall be upon a receipt.

#### (B 1.) If the wife be received.

If the wife be received, there need not be a declaration *de novo*, for she was party to the suit before. R. Cro. El. 826.

#### (B 2.) If he in the reversion.

But where he in reversion, not party to the suit, is received, there shall be a declaration *de novo*. Cro. El. 826. Cont. per Dyer, the other J. acc. Mo. 29. R. cont. per all the J. for, *venit paratus respondere* to the demandant, and therefore he ought to answer immediately without imparlance; for he takes notice of the demand. Mo. 34.

#### (B 3.) How the party shall plead.

After receipt of a tenant for years, he shall be allowed to plead for the safety of his interest. 2 Inst. 324. Vide Abatement, (I 31.)

Tenant for years ought to traverse the title of the demandant, or plead in bar to it. 2 Inst. 323, 324.

#### (B 4.) Judgment by or against tenant by receipt.

Tenant for years cannot be received after judgment. 2 Inst. 323.

If he be received before judgment, and his plea allowed, judgment shall be only that execution for the demandant be suspended during the term. 2 Inst. 324.

And though there be such judgment, he shall pay his rent, shall be subject to waste, &c. 2 Inst. 323.

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### Receipt of parcel.

Vide ABATEMENT, (H 51.)

### Court of receipt in exchequer.

Vide COURTS, (D 4.)

RECEIVER.

## RECEIVER.

Vide ACCOMPT, (A 4. E 5.)

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## [RECEIVER-GENERAL.]

[It is not sufficient that the receiver-general swears to his account before the 5th April, to enable him to set *insuper* upon a parish, unless the account is declared and passed within that time. Wight. 97.]

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## RECITAL.

Vide EVIDENCE, (B 5.) — FAIT, (E 1.) — GRANT, (G 10.) — PAROLS, (A 19.) — PLEADER, (C 9.)

## Recital of a statute.

Vide ACTION UPON STATUTE (G—H—I.) — PLEADER, 2 S 2.)

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## RECOGNIZANCE.

Vide BAIL, (O—P.) — DEBT, (A 3.) — ENFANT, (B 4.) — FORCIBLE ENTRY, (D 20, &c. 26. 27.) — JUSTICES OF PEACE, (B 5, 6, 7, 8.) — OBLIGATION, (K.) — PARLIAMENT, (L 47.) — PLEADER, (2 W. 10. 34, 35. — 3 L 16.) — STATUTE STAPLE, (B).

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## RECOMPENCE.

Vide DISMES, (E 10. 17.)

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## RECORD.

- (A) What is matter of record. p. 208.
- (B) How tried. p. 209.
- (C) What will be a material variance. p. 209.
- (D) What not. p. 210.
- (E) No averment against a record. p. 211.
- (F) A record cannot be varied. p. 211.
- (G) A record removed from one court to another. p. 211.
- [(H) Proof of a record.] p. 211.
- [(I) Withdrawing a record.] p. 211.

## (A) What is matter of record.

A record is a memorial of a proceeding or act of a court of record, entered in a roll of parchment for the preservation of it. Co. L. 117, b. 260. a.

[And

[And a record found in the proper office must be intended to have been always in the plight in which it is found; parol evidence shall not be admitted to prove that it was once wrong, and has since been altered. 1 Bl. Rep. 664.]

[A foreign judgment is not a record; and therefore *nul tiel* record is no plea to an action on such a judgment, though the plaintiff has called it a record in his declaration, and concluded *prout patet per recordum*. Doug. 1. 7.]

[A roll is not a record till it is put in the bundle. Fort. 355.]

[An affidavit read and filed becomes a record of the court, and cannot be taken off the file. 2 Wils. 371.]

[If record is lost, the court may order a new entry. Str. 141.]

[If writ of inquiry is executed, costs taxed, but final judgment not entered, and it is lost, the court may order new writ of inquiry, and inquisition to be made according to the sheriff's notes, and the costs to be indorsed according to commitment-book. Str. 1077. Andr. 12.]

[An extent and inquisition being lost, may, on motion, be new engrossed from the sheriff's minutes signed by the jury. Bunb. 88. N. B. Defendant consented; and dissent. Montague B.]

[So, a new *postea* may be made from the record above, and the minutes in the associate's book. Str. 1264.]

[After verdict, record of *nisi prius*, and writ of *habeas corpus jurat*. lost, new record and writ may be made out, and verdict returned. Barnes, 466.]

[If judgment-roll is carried in and docketed, and then lost, a new roll may be filed, on motion, many years afterwards. Str. 833.]

### (B) How tried.

A record is of so high a nature, that it can be tried only by itself. Co. L. 117. b. Vide Trial (A).

If issue be upon *nul tiel record*, where the record is alleged in the same court, day shall be given for the inspection.

If there was such a record at the time of the plea, the issue shall be for the plaintiff, though there be a discontinuance entered upon the record before the day given for producing it. R. 1 Sal. 329.

But if *nul tiel record* be pleaded as to a judgment, outlawry, &c. and before the day given for producing the judgment, &c. it is reversed by error; the issue shall be for the defendant; for by the reversal it is annulled *ab initio*. 1 Sal. 329.

### (C) What will be a material variance.

If a man pleads *nul tiel record*, and there be a material variance between the record itself, and the record pleaded, it will be a failure of the record; as, if a recognizance be taken before a judge in his chambers, and a *scire facias* is sued upon a recognizance before the justices in court. R. Mod. Ca. 42. Vide Pleader, (3 B 13.)

[If in debt on judgment of Hilary term, and *nul tiel record* pleaded, it appears to be a judgment of Easter term. Fort. 353.]

If the name of any party, his abode, or addition varies. 1 Rol. 754. l. 5.

Or, there are more or fewer persons parties. 1 Rol. 753. l. 45.

If it be for different parcels. 3 Co. 2. a.

Or, different damages are recovered. 1 Rol. 754. l. 40.

If in trespass for an assault, 15th May, 9 W. 3. and detaining for twenty days, the defendant pleads a recovery for the same trespass, against a joint-trespasser, and the record is for an assault 14th May, and detaining for ten days; where there is not an express averment that they are the same. R. Lut. 945.

If a recovery be recited to be upon an affirmation by A., B., and C., and the record is by A. and B. only. R. Mo. Ca. 168.

[If *certiorari* to remove conviction against A. and his wife, and the return be of conviction against A. only; for this variance the *certiorari* will be quashed. Str. 116.]

[If judgment is on several promises, and entire damages, and the *scire facias* recites *cujusdam promissionis*, it is variance, and cannot be amended. Str. 892.]

[If plaintiff, in an action against sheriff, says, that by precept of the king, &c. and on *nul tiel record* it appears to be a bill of Middlesex, judgment shall be, *quod perfecit recordum*. Str. 1069.]

### (D) What not.

But if a record has not a material variance, it is not a failure of record; as, if in an action upon the case for a conspiracy in indicting of barrettry, it be alleged that it was *coram justiciariis de P. necnon ad diversas felonias*, &c. and the indictment was before justices of the peace, without more; for, as justices of the peace, they may take the indictment. R. 2 Cro. 32. Yel. 46.

If to a recognizance pleaded, *nul tiel record* be applied, and thereupon a recognizance with a condition be produced. Pl. Com. 14. b.

If to an information, a prior information, 28th April, 14 Jac. for the same cause be pleaded, and upon *nul tiel record* an information, 29th April, without other variance, be produced; for it was prior. R. Hob. 209.

In trespass, the defendant justifies by an execution out of an inferior court, where a plaint was, and afterwards, viz. 2 Oct. 34 Car. 2. judgment, &c. *nul tiel record*, the record of the judgment produced was 25th December, 34 Car. 2. yet a good execution. Dub. 3 Lev. 243.

If a variance be in the style of the king, as, if Scotland be omitted. 3 Mod. 228.

[If the record has a date in words at length, and George now king, and the replication has the date in figures, and also in words at length interlined, and George the Second, now king, it is no variance; for the figures and the Second shall be rejected as surplusage. B. R. H. 131.]

If the judgment pleaded be *in cur. O. protect. Anglie et domin. et territor. adinde spectan.*, and in the record produced (*territor.*) is omitted. R. 3 Mod. 227.

If a patent be pleaded without mention of a date, and upon *nul tiel record*, a patent be produced with a date. 20 H. 7. 7. a.

If the record produced varies only in the process, or continuances, (being out of an inferior court,) it is not material. R. Hob.

If

If a fine with proclamations be pleaded, An. 30 H. 8. but the record produced has proclamations, Pasch. Mich. and Hil. An. 30 H. 8. and the proclamations of Trin. are entered without mention of the year; for, of necessity, it must be the same year. R. Dy. 234.

[On *nul tiel record*, Segrave for Segrave, no variance, *quia idem sonnat*. Str. 889.]

[Declaration for damages only, record for damages and costs, is not material. Barnes, 274.]

**(E) No averment against a record.**

A record is of so high a nature, that no averment can be taken against the record. Co. L. 260. a.

So, though the matter be only supposed by the record; as, if a fine be of land in A. and B., it cannot be averred that there is no such vill as A. 1 Léo. 82.

[The record of a court of competent jurisdiction, imports incontrovertible verity as to all the proceedings which it sets forth as having taken place; an averment to the contrary, therefore, in pleading, cannot be made. 2 M. & S. 565.]

**(F) A record cannot be varied.**

So, regularly, a thing entered upon record, cannot be varied.

So, in the same term, an act of the party, entered upon record, shall not be varied; as, a nonsuit or default. Sal. 567.

A default of the defendant in ejectment to confess lease, entry, and ouster; though the plaintiff consents. R. Sal. 566.

But the act of the court may be varied in the same term. Sal. 567.

[An alteration in a record cannot be made without leave of the court, even with the consent of the opposite party. 7 T. R. 475.]

**(G) Record removed from one court to another.**

How a record shall be removed for error, vide Pleader, (3 B 13.)

How by *certiorari*, vide *Certiorari*, (A 1, &c.)

A record removed out of another court into B. R. can never be remanded after it is filed, in the same or in another term. R. 1 Sal. 352.

**[(H) Proof of a record.]**

[It is sufficient proof of the copy of a record, that the original was read to the witness by the proper officer, and that the copy agreed.]

**[(I) Withdrawing a record.]**

[A record may be withdrawn unconditionally on a fair presumption arising that an impartial trial cannot be had.]

Vide more concerning Record in Amendment (K 1, 2.—N.)—Enquest, (A 2, 3.)—Estoppel, (A 1.—E 1, &c.)—Evidence, (A 1, &c.)—Forfeiture, (A 2.)—Imprisonment, (H 1.)—Pleader, (E 18.—F 20.—G 6.—P 2.—S 14. 16.—S B 13.)—Prærogative, (D 66.)—Return, (E 4)—Sewers, (D.)—Trial, (A).

## RECOVERY.

## Mul tiel Record.

Vide PLEADER, (2 W 13.)

## RECORDARE.

Vide ANCIENT DEMESNE, (G 5.)—DROIT, (B 6.)—PLEADER, (3 K 8.)

## RECORDER.

Vide FRANCHISES, (F 24.)

## Recorder of London.

Vide CERTIFICATE, (B).—LONDON, (E).

## RECOVERY.

(A) Recovery. *infra*.

(B) Common recovery.

(B 1.) By whom it may be suffered. p. 213.

(B 2.) By whom not. p. 214.

(B 3.) Who shall be a good tenant to the *præcipe*.  
p. 215.(B 4. a.) What the effect will be, if there be not a  
good tenant. p. 217.

[(B 4. b.) Writ of summons.] p. 217.

[(B 4. c.) Vouching.] p. 217.

[(B 4. d.) Miscellaneous.] p. 217.

(B 5.) The effect of a recovery. p. 218.

(B 6.) When it may be falsified:—by the issue in tail.  
p. 218.

(B 7.) By him in reversion or remainder. p. 218.

(B 8.) By a termor for years. p. 218.

(B 9.) How the proceeding shall be. p. 219.

## (A) Recovery.

A recovery is, when a man obtains or recovers his right in lands or goods, &amp;c. by judgment or trial at law. Co. L. 154. a.

And every recovery is feigned (which is usually called a common recovery) or real.

[Common recoveries are now a mere form of conveyance, allowed (under certain circumstances of form and ceremony) to tenants in tail in possession, generally; and to tenants in tail in remainder, with consent of the owner of the first estate for life. 1 B. M. 60.]

[And therefore are expounded more liberally than adverse suits. Cowp. 346.]

(B) Com-

## (B) Common recovery.

## (B 1.) By whom it may be suffered.

A common recovery may be suffered by him who has an estate in fee.

Or, by him who has an estate-tail in possession.

[And if a man devise to his daughter an express estate-tail, but afterwards say such devise shall be void as to inheritance of heirs; if she die without children, and the estate shall descend to his heir male, a recovery suffered by the daughter is good, though she afterwards die without issue. Cowp. 379.]

So, the tenant for life, and remainder-man in tail, may join to suffer a common recovery. R. 10 Co. 44, 45. Cro. El. 570. Mo. 690. Vide Estates, (B 27.)

[Tenant for life in possession and a remainder-man in tail, may, notwithstanding the intervention of intermediate estates, suffer a recovery. Co. L. 204. b. But such recovery will only bar the estate-tail; and the subsequent remainder; it will not affect the intermediate estates. Dace. Ibid.]

[If A., tenant for years, with remainder to B. for life, remainder to the first and other sons of B. in tail, remainder to B. himself in tail, join with B. in a lease and release to make a tenant to the *præcipe*, and suffer a recovery; the estate-tail limited to the sons of B. is not divested by the recovery; only the remainder to B. in tail, subsequent to the remainder in tail to his first and other sons, is barred. 1 Term. Rep. 738.]

So, husband and wife, seised in right of the wife, may suffer a recovery of the inheritance of the wife. 2 Rol. 395. l. 44. Vide Baron and Feme, (G 2.)

[If A. devise lands to B. and his heirs, to the use of B. and his heirs, in trust for C. and the heirs of her body, remainder to B. in fee, on condition that he marry C. which he offers to do, and she refuses and marries another, and at full age suffers a recovery with her husband, this bars the remainder, though without a fine. C. T. T. 164.]

So, they may join a recovery, where they are jointly seised of an estate, before or after marriage. Vide Baron and Feme, (G 2.)

So, a recovery by the husband alone, as vouchee, will be good against all but the wife, where they are jointly seised for life, remainder to the husband in tail. Ibid.

So, if they were tenants in special tail, remainder to the husband in tail, remainder over, it will be a bar to all remainders.

So, a recovery upon a *præcipe* against the husband alone, where they were joint-tenants for life, before the coverture remainder to the husband in tail, will be good for a moiety. R. Mo. 95.

So, a recovery by an infant, as vouchee, by his guardian, will be good. Vide Infant, (B 2.)

So, if he appears by attorney, or in person, it shall be good, till it be defeated by error. Vide Infant, (B 2.)

[By st. 14 G. 2. c. 20. s. 4. purchaser for valuable consideration, after twenty years, producing the deed to make tenant to the writ, and declaring the uses; such deed shall be evidence that the recovery was duly suffered, provided the person making the deed had sufficient estate and power.]

## (B 2.) By whom not.

But a recovery suffered by tenant for life, is not good; for by the st. 32 H. 8. 31. and 14 El. 8. it will be a forfeiture, for which he in remainder may enter, after or before execution. R. 1 Co. 15.

Though he conveys to another in fee, who suffers a common recovery, in which the tenant for life is vouchee. R. 1 Co. 15. Mo. 271.

[A. is tenant for life with remainder in fee to his heirs male or female, if he had any; and if he had none, then a remainder over; and suffers a recovery, whereby all the remainders, being contingent, were barred. 5 T. R. 299. 1 Ld. Raym. 203.]

So, if there be tenant for life, remainder to B., in tail, a recovery by B. is void, and does not bind his issue by *estoppel*. R. Mo. 256.

So, if A. tenant in tail, enfeoffs B., who re-enfeoffs A., C., and D., for the life of A., remainder to F. in fee, and a recovery is had against A., and after his death C. and D. enter; this recovery binds the feoffees C. and D. only during the life of A. R. 1 And. 44.

So, a common recovery by him, who is not seised in privity of the estate-tail, does not bar the entail or remainders. 2 Rol. 394. l. 40.

As, if tenant for life, remainder to B. in tail, be disseised, and the disseisor enfeoffs B. who suffers a recovery, it does not bar the entail; for B. was not seised of it, and the recompence does not extend to it. R. 3 Co. 59.. 2 Rol. 395. l. 5.

So, a recovery by tenant in tail, after an attainder for treason, does not bar the remainders. 2 Rol. 394. l. 37.

So, if an eldest son, inheritable to the entail, enfeoffs A. against whom a *præcipe* is had with a voucher of the son, who afterwards dies without issue, in the life of tenant in tail; the recovery does not bar the younger son of the tenant in tail. R. 1 And. 44.

So, a common recovery by husband alone, seised in right of his wife, does not bar her estate. 2 Rol. 394. l. 10.

So, a recovery by an infant does not bar him. 2 Rol. 395. l. 45. Vide ante, (B 1.)

[A recovery ought not to be supported where the parties had no power to suffer it; and stat. 14 G 2. c. 20. proceeds upon their having power to suffer it. 1 B. M. 60.]

[A secret feoffment under a naked possession is not sufficient to support a common recovery suffered by the remainder-man. Ibid.]

[Those who have no power to suffer a recovery, shall not, by making an estate by wrong, or fraud, or practice, bar those in remainder or reversion; and such estate is no estate in law. Ibid.]

[A recovery, which the parties had no power to suffer directly, and without such fraudulent estate, shall not be made good by wrong and fraud. Ibid.]

[A feoffee to the intent to be tenant to the *præcipe* is a mere instrument for one purpose of form only; and a man, by his own injurious feoffment, shall not acquire an advantage to himself; an act founded on wrong, shall not, by virtue of the crime itself, become legal, for the author's advantage.. Ibid.]

[If A., tenant in tail-remainder, after the death of B. jointress, tenant for life in possession, recovers in ejectment against her, and enters, and has possession, but B. is not ousted, nor A. seised, and A. enfeoffs C.  
to

to make him tenant to the *præcipe*, and a recovery is thereupon suffered, it is void; for A. is not a disseisor, nor is his feoffment a disseisin. Ibid. Vide Cowp. 702.]

(B 3.) Who shall be a good tenant to the *præcipe*.

In every common recovery there ought to be a good tenant to the *præcipe*; and therefore, if the tenant had not the freehold at the time of the recovery, it will be error. [6 T. R. 708.]

[Actual seisin is necessary to a recovery suffered of an estate-tail; so that if suffered by remainder-man, surrender of life estate must appear. 2 Burr. 1065.]

[A common recovery is valid against parties and privies, though there be no good tenant to the *præcipe*. 2 N. R. 491.]

[Limitation to A. for ninety-nine years, if he so long live, "and from and after the death of A. or other sooner determination of the estate limited to A. for ninety-nine years, then to trustees during the life of A. to preserve contingent remainders, and after the end or other sooner determination of the said term, then to the first son of the body of A. in tail male," with divers remainders over: A., together with his son B., levied a fine and suffered a recovery, and both died: it was holden, that the limitation to B. was a good limitation; that the limitation to the trustees was a vested remainder; that the freehold was in them at the time of levying the fine, consequently that the fine did not make a good tenant to the *præcipe*, and that the recovery did not bar either the remainder to B. or the subsequent remainders. Wils. 327. 4 Bro. P. C. 405. 3 Atk. 135. S. C.]

As, if A. be tenant for life, remainder to B. in tail, and the *præcipe* be against B. 1 Vent. 360. 3 Co. 6. b.

Or, against A. and B., for B. has nothing in the freehold. Dy. 252. b. 3 Co. 6. b.

So, if by fine an estate be given to husband and wife for their lives, and the *præcipe* be against the husband alone; for they take by entireties, and the husband alone has nothing. R. 3 Co. 5. a. Mo. 210. 1 And. 162. R. Sal. 568.

So, if the husband alone, by lease and release, conveys to B., and a *præcipe* be against B.; for the husband cannot dispose of any part of the land. Semb. 3 Co. 5. a.

But it will be good, if he had the freehold at the time of the recovery, though it was upon a defeasible title; as, by feoffment, as well as by fine of tenant in tail, though this was a discontinuance.

By bargain and sale of the tenant in tail.

[Though the bargain and sale was not inrolled till the recovery completed. C. T. T. 164.]

Or, lease and release.

Though the bargainee was made tenant to the *præcipe* before inrollment, if the deed be afterwards inrolled. 1 Vent. 360. Cont. per Hob. Godb. 218. but this seems misreported. 2 Rol. 394. l. 40.

If he be made tenant of the freehold by the uses declared of a fine, which is afterwards reversed. R. Sal. 568.

If tenant for life surrenders to him in reversion, or remainder, upon condition, and afterwards a *præcipe* is brought against him in reversion or remainder; though immediately after the recovery, the tenant for life re-enters for the condition broken. Semb. Skin. 3. 63.

If tenant in tail levies a fine to A. and his heirs, to the intent to make him tenant to the *præcipe*, and seven years afterwards a *præcipe* is brought against A. who vouches the tenant in tail; he shall be a good tenant, though no use be declared to him by writing, since the st. 29 Car. 2. 3. R. Eq. R. 17.

So, if tenant in tail, and a stranger who has nothing, are tenants to the *præcipe*, it will be good. 1 Vent. 358. R. Pl. Com. 514. Skin. 3.

So, if tenant for life surrenders to B. in reversion (who is made tenant to the *præcipe*) at any time before the recovery suffered; though the judgment relates to the first day of the term. Per two J. Noy. 126.

So, if a *præcipe* be against A. returnable 15th Mart., and A. then appears and vouches B. tenant in tail, against whom a summons *ad warrantizandum* goes, returnable Oct. Pur., and B. by lease and release, 1st and 2d Jan. before conveys to A. for life; it is sufficient to make him a good tenant to the *præcipe*, though he was not so at his appearance or voucher. R. & Aff. in error, Sal. 569. Comb. 425.

So, it is sufficient if he be a good tenant at any time before the recovery had, viz. the judgment. Sal. 569. Sho. 347.

[The possession of the particular tenant renders inoperative, as against strangers, a fine levied by the remainder-man. 2 N. R. 1.]

[Tenant to the *præcipe* residing in London received at bar by attorney. 5 Taunt. 355.]

[The deeds making a tenant to the *præcipe* (under st. 14 Geo. 2. c. 20.) be executed at any time within the term in which the recovery is suffered, though after seisin delivered. 2 H. Bl. 46; 5 T. R. 177.]

[The executing by an officer of a writ of possession on the 16th of November, and subsequent acknowledgment by the tenant in possession, who was not displaced of the plaintiff's title, is sufficient seisin to warrant a fine of Michaelmas term actually levied on the 8th. 11 East, 495.]

[*Seemle*, that in the absence of fraud, the receipt of rent after a fine levied for a period antecedent to the levy, is evidence of seisin. 11 East, 495.]

[Return of writ of entry in a recovery adapted to the time of taking the acknowledgment. 5 Taunt. 259.]

[By stat. 14 Geo. 2. c. 20. common recovery of premises in lease for lives are valid, without surrender of such leases, or the tenant's joining to make a tenant to the writ.]

[s. 2. But not unless the person entitled to the first estate for life, or greater estate after the expiration of such lease, shall convey an estate for life at least to the tenant of the writ.]

[s. 3. And this shall not prejudice the estate of the lessee.]

[s. 5. After twenty years it shall be good, though the deed to make the tenant do not appear.]

[s. 6. Recovery shall be good, though the fine or deed, making the tenant, should be levied or executed after judgment in the recovery, and the writ of seisin awarded, provided it is the same in term.]

[Where the deeds to make a tenant to the *præcipe* were not executed until after the execution of the writ of seisin; still the recovery was holden good because the deeds were executed in the same term in which the recovery was suffered. 2 H. Bl. 47. B. R. E. 33 Geo. 3. 5 T. R. 177.]

[If tenant in tail in remainder suffer a recovery, it shall be presumed after a long time, (as forty years,) that tenant for life in possession surrendered. Str. 1129.]

[But here was also an entry in the attorney's debt-book, he being then dead, of drawing and engrossing surrender from tenant for life, mother to the tenant in tail; and the bill was paid. 2 B. M. 1065.]

[On an old recovery, where no deed appears, a proper tenant to the *præcipe* shall be presumed; but if a deed appears wherein proper parties did not join, and the uses are declared to be warranted by such deed, the court will not presume there is any other. Str. 1267.]

[When one has power to suffer a recovery, it shall be presumed all is rightly done, unless something appears to the contrary. Ibid.]

[But there can be no presumption where there is no ground for it. Ibid.]

[The supposition that tenant in tail would not suffer a recovery, without getting a surrender of life-estate, forms no presumption. Ibid.]

[A long possession by tenant in tail, after death of tenant for life, doth leave ground of presumption. Ibid.]

(B 4. a.) What effect there will be, if there be not a good tenant.

If there be not a tenant of the freehold tenant to the *præcipe*, the recovery will be void.

And, therefore, if a recovery be pleaded in bar, the plaintiff may say, that the party named tenant *non tenuit*. Jon. 352, 353.

But if it be found that the person named tenant was tenant for part, the recovery will be good for so much, though void for the residue. R. Jon. 353. 374.

#### [(B 4. b.) Writ of summons.]

[The court will not enlarge the return of a writ of summons in a common recovery, so as to make a term intervene between the *teste* and the return. 2 Blk. 1201. Id. 1223.]

[If the return of a writ of summons in a common recovery, be on Sunday, and the vouchee die on that day, the recovery is bad. 3 Burr. 1595; 1 Blk. 496. 526.]

#### [(B 4. c.) Vouching.]

[Where there are more vouchers than one, the warrant for each may be on a separate parchment. 1 B. & P. 31.]

[Separate warrants of attorney, though on the same parchment, will not support a joint voucher. 3 B. & P. 361.]

[It is no objection that the tenant in possession is vouched jointly with others, whether strangers or remainder-men, who vouch over the common vouchee. 2 Taunt. 59.]

#### [(B 4. d.) Miscellaneous.]

[The court will not record the tenant's appearance of a subsequent term as of a prior term. 4 Taunt. 589.]

[The court permitted a recovery to be completed *nunc pro tunc*, which had been delayed by the obstinacy of one of several vouchees. 4 Taunt. 618.]

(B 5.)

## (B 5.) The effect of a recovery.

How recovery by judgment, &c. shall be executed, vide Execution, (A 2. 6.)—Fine, (E 15.)

A judgment *semper pro veritate accipitur*. Co. L. 39. a.

And, therefore, by the common law, a party, or privy to the judgment, can never falsify the same recovery.

So, the issue in tail cannot falsify recovery against tenant in tail, after a verdict, in the point tried. Co. L. 361. a.

Nor, a wife after the death of her husband, upon a recovery against the husband. 2 Inst. 350.

So, he in remainder or reversion, or any, who derive an interest under him, cannot falsify a common recovery by tenant in tail. 1 Co. 62. b.

So, if there was a term for years, and afterwards a recovery against the tenant of the freehold, the termor by the common law, could not falsify the recovery, though it was by collusion. Co. L. 46. a. 2 Inst. 322.

[If tenant in tail mortgage for years, and suffer a recovery afterwards, that shall let in the mortgage, and all other incumbrances made by himself. 1 Wils. 276.]

## (B 6.) When it may be falsified : — By the issue in tail.

But if a recovery be against tenant in tail by default, the issue in tail may falsify it, if it was upon a false title ; as, if A. recovers against tenant in tail, in a writ of entry upon a *disseisin* alleged by him of the grandfather of A., and after default execution is sued ; the issue in tail may have a *formedon*, and if the recovery be pleaded, may say, that tenant in tail did not disseise the grandfather of A. Lit. s. 688.

So, if a recovery be against tenant in tail by *nil dicit*, confession, or demurrer. Co. L. 361. a.

So, if a recovery be against tenant in tail by verdict, though the issue in tail cannot falsify it in the point tried, he may falsify it by collateral matter ; as, by a collateral warranty, or a release, not pleaded by the tenant in tail. Ibid.

So, the issue in tail may avoid a recovery, by confession and avoidance of the point tried. Ibid.

## (B 7.) By him in reversion or remainder.

So, if a recovery be against tenant for life, which makes a discontinuance of the reversion or remainder, it may be avoided by entry. Co. L. 362. a.

If the recovery was by covin, or consent, by the st. 32 H. 8. 31. and 14 El. 8. it will be a forfeiture, and he in reversion or remainder may enter for the forfeiture. Co. L. 362. a. Vide Forfeiture, (A 2.)

## (B 8.) By a termor for years.

So, by the st. Glo. 11. if a recovery be by default in London against the tenant of the freehold, he, who has a term for years, being ousted, the mayor and bailiffs may inquire, whether the recovery was by collusion, and if so found, the execution shall be suspended till the term is passed ; so by equity, before justices, if the termor challenges before judgment.

And

And therefore, before judgment, the termor by deed may claim to be received to defend his right. 2 Inst. 323. Vide Receipt, (A 1.)

And after judgment, he who has a term by deed, if the judgment, was by default, shall have a writ of inquiry upon that statute, to inquire, whether the judgment was by collusion? and if it be so found, the judgment shall be suspended, till the term is passed. 2 Inst. 321.

And this upon a recovery in other courts, cities, or boroughs, as well as in London. 2 Inst. 322.

So, now, by the st. 21 H. 8. 15. a termor for years, by deed, or without writing, may falsify for his term only, a recovery by feigned and untrue title; and shall enjoy his term according to his lease, against such recoverer, his heirs and assigns. And so may tenant by statute merchant, staple, or *elegit*. Vide Co. L. 46. a. 2 Inst. 322.

And this though the demise for years be not by writing. 2 Inst. 322.

So, if there be a recovery in dower by a woman, against lessee for years, as tenant of the freehold; he may enter upon the demandant for his term, though he has not pleaded *non-tenure*. Per two J. 1 Leo. 92.

#### (B 9.) How the proceeding shall be.

The proceeding to falsify such recovery against him who has the freehold, shall be by writ, in the nature of a commission to the mayor and bailiffs, reciting the lease, the action brought by collusion, and the st. of Gloc. and afterwards commanding them to do right. 2 Inst. 323.

Vide more concerning a Real Recovery in Action, (K 1, &c.) — Estates, (B 26.) — Pleader, (3 M 14.) Concerning a Common Recovery in Baron and Feme, (G 2.) — Chancery, (3 N 1. 2. — 4 K 1, 2.) — Infant, (B 2.) — Estates, (B 27, &c.) — Fine. — Pleader, (2 Y 14. — 3 A 2, &c.)

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### RECTOR.

Vide DISMES, (C 1.) — ECCLESIASTICAL PERSONS, (C 6.)

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### RECTORY.

Vide ECCLESIASTICAL PERSONS, (C 6.)

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### RECUSANT.

Vide JUSTICES of PEACE, (B 17, 18, 19.)

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### REDEMPTION.

Vide CHANCERY, (4 A 4, &c.)

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### RE-DISSEISIN.

Vide ASSISE, (F).

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### RE-ENTRY.

Vide RENT, (D 3, &c.)

RE-

**RE-EXTENT.**

Vide STATUTE-STAPLE, (D 7, 8.)

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**REEVE.**

Vide LEET, (M 3.)

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**REFERENCE.**

Reference to a master..

Vide CHANCERY, (W 1, &c.)

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**REFUSAL.**

Refusal of tender.

Vide CONDITION, (L 4.)

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**REGARDER.**

Vide CHASE, (Q 3.)

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**REGISTER.**

Registers of chancery.

Vide CHANCERY, (B 6.)

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**REGISTERING ESTATES,**

Vide POPERY, (B 10. 12.)

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**REGRATING.**

Vide JUSTICES OF PEACE, (B 39.)

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**REGULATION OF TRADE.**

Vide TRADE, (B).

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**RE-HEARING.**

Vide CHANCERY, (Y 5.)

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**RE-**

## REJOINDER.

Vide CHANCERY, (O). — PLEADER, (H).

## RELATION.

Vide BARGAIN AND SALE, (B 9.) — CHANCERY, (3 Y 16, 17.) — CONFIRMATION, (D 5.) — DETT, (G 9.) — EXECUTION, (D 1, 2.) — FORFEITURE, (B 6.) — PARLIAMENT, (R 1.)

## RELEASE.

### (A) Release.

- (A 1.) Express : — By what words it shall be. infra.
- (A 2.) Release in law. p. 222.
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### (A) Release.

- (A 1.) Express : — By what words it shall be.

A release is, when a man quits or renounces that which he before had.

And

And it may be by express words, or by act in law. Co. L. 264. b.

A release by express words does not require any particular word; for if a man remises, or quits claim, it will be of the same effect as the word, release. Lit. s. 445.

So, if he renounces, acquits, &c. Co. L. 264. b.

If a joint-tenant grants, bargains, and sells his land to his companion; this amounts to a release. R. 1 Vent. 78. 2 Sand. 96. 1 Sid. 452. Ray. 187. 1. Lord Raym. 420. 690.

So, if a lessor grants, that his lessee shall be discharged of his rent; this amounts to a release. Co. L. 264. b.

So, if a man acknowledges himself to be satisfied and discharged of all bonds, &c. by the obligor; this amounts to a release of a bond, R. 9 Co. 52. b.

So, if a man covenants that he will never sue for a debt; this amounts to a release. Cro. El. 352. 1 Rol. 939. l. 50. Per Holt, Sho. 47.

So, if he covenants, that he shall not be sued within such a time, and if he be, that it shall be a release; this amounts to a release. 21 H. 7. 24. 1 Rol. 939. l. 50.

But, if a man by deed grants, that the obligor shall not be sued before such a feast; this does not amount to a release; but is only a covenant. R. 21 H. 7. 24. a. R. Cro. El. 352. 1 Rol. 939. l. 45. R. T. R. 1 W. & M. B. R. inter Ayliffe and Schrimshire, Sho. 47.

Or, covenants that he will not sue in such a time upon pain of forfeiture of his debt. Semb. Sho. 331.

[Where an obligee covenants not to sue the obligor at all, he may plead it as a release to avoid a scrutiny of action. 8 T. R. 168.]

[Where an obligee covenants not to sue one of two joint and several obligors, and if he did that, the deed of covenant might be pleaded in bar, he may still sue the other obligor. 8 T. R. 168.]

[Two partners, A. and B. on 26th August, 1809, agree to dissolve the partnership, as from 1st Jan. 1810, and that neither of them shall, after signing the deed of dissolution, make any purchase to bind the other; but that every such purchase be on his own private account. On 27th Oct. 1810, A. assigns his property to his creditors, who covenant not to sue him, and that if they do, the deed of assignment shall be a release to him, which deed is signed by B. A., after signing the deed of dissolution, having contracted debts in the name of the firm, B. pays them. Held, 1. That B. was liable for those debts, the covenant not to sue A., not operating as a release to B. — 2. That supposing it had, the creditors would have had an equitable claim on B., which would have justified his paying the money; and therefore that B. was entitled to recover it from A. as money paid to his use. 1 Mars. 603. 6 Taunt. 289.]

So, a release by express words can only be by deed. Co. L. 264. b.

### (A 2.) Release in law.

So, a release may be by act, or operation of law; as, if a lord disseises his tenant, and makes a feoffment, by deed, or without deed; this amounts to a release of his seigniority. Co. L. 264. b.

If a disseisee disseises the heir of the disseisor, and makes a feoffment; this amounts to a release of his right. Ibid.

So,

So, if a man makes his debtor, by bond or otherwise, his executor; this amounts to a release of the debt; for he cannot have an action against himself, and a personal thing suspended is lost. Co. L. 264. b. Vide Administration, (B 5.)

So, if there are joint-debtors, and he makes one of them his executor, or the wife of one of his executrix. Ibid.

So, if a woman obligee, or one of the obligees, takes to husband the debtor; it will be a release of the debt. Co. L. 264. b.

[But a bond given upon the eve of and in contemplation of a marriage between the obligor and obligee, and for the benefit of the wife, is not extinguished by such marriage. R. 5 T. R. 381.]

[Particularly if the money secured by the bond is not made payable until after the husband's death. 5 T. R. 381.]

[In an action upon a bond conditioned for paying 3000*l.* to the obligee, her executors, &c., at the expiration of 12 months after the death of the obligor, the defendant pleaded that the obligor and obligee afterwards intermarried; the plaintiff replied that the bond was given in contemplation of the marriage, and with intent that the obligee should have the full benefit of it, if she survived; and upon a general demurrer the court held the replication good; and gave the plaintiff judgment. 5 T. R. 381. P. C.]

[So, where it was said at the bar, that a bond given before marriage by the intended husband to the intended wife by way of settlement, was extinguished at law by the marriage; Lord Mansfield said, that was a mistake, for the bond was not extinguished; and that Wright, J. had allowed the payment of such a bond to be given in evidence on plain *administravit*, which he, Lord M., thought right. 5 T. R. 386.]

But an act does not amount to a release in law, to the prejudice of another; as, if an executrix takes to husband the debtor of her testator. Co. L. 264. Vide Administration, (B 5.)

Or, the ordinary grants administration to him. Vide Administration, (B 5.)

So, where a man makes his debtor executor, &c., his debt shall be assets in his hands for the testator's creditors. Vide Administration, (B 5.)

So, a release in law shall not be extended beyond the evident intent; as, if a disseisee disseises the heir of the disseisor, and makes a lease for life; this does not amount to a release of his right, but only for the life of the lessee. Co. L. 264. b.

### (A 3.) When words enure to a double intent.

If a woman *mesne* takes to husband the tenant *peravaille*, and the lord releases his right to the husband; this enures to extinguish the seignior, and also the *mesnalty*. Co. L. 280. a.

So, if a tenancy be granted to the lord and B. and the heirs of B., and the lord releases to B.; this enures to pass his estate in the tenancy to B., and also to extinguish his seignior. Co. L. 280. a.

So, a lord grants his seignior to B. for years, and afterwards releases to him and the terre-tenant, generally; the seignior, and also the estate of B., shall be both extinguished. Co. L. 280. a.

(B) Re-

**(B) Releases; how they enure:—Release of a right.****(B 1.) What shall be a good one.**

Releases are of a right, or of an estate in lands and tenements, or of things personal.

If a man, who has but a naked right to land, releases all his right to him who has the freehold of the same land; it will be a good release of his right. Lit. s. 447. 10 Co. 48.

As, if a disseisee or his heir release to the disseisor or his heir.

So, if he releases to him who has but a freehold in law, and not in deed; as, if he releases to the heir of the disseisor before his entry. Lit. s. 448.

So, if he releases to him who has the reversion or remainder in deed of the same land, though he has not the freehold; as, if disseisor makes a lease for life only, and afterwards the disseisee, or his heirs, releases to the disseisor, who has the reversion in him. Lit. s. 449.

So, if a disseisor releases to A. for life, remainder to another, and the disseisee releases to him in remainder. Lit. s. 450.

So, if he, who has an annuity by prescription out of a rectory, releases to the patron in time of vacation. Col. L. 266. a.

So, if he releases to him, who has an estate only by *estoppel*, or in supposition of law; as, if the demandant releases to the tenant in a *præcipe*, it will be good, though he has aliened before, *pendente lite*. Co. L. 266. a.

Or, to the vouchee, though he has nothing in the land; for he is tenant to the demandant in supposition of law. Co. L. 265. b.

So, a release of a right may be good, in respect of privity, to him who has not any estate; as, if a tenant be disseised, and the lord releases all his right to the disseisee; his seigniorship is extinct. Lit. s. 454.

So, if a donee, rendering rent, be disseised, and the donor releases to him his right; this extinguishes his rent in respect of the privity. Lit. s. 455.

Or, if the donee, rendering rent, discontinues in fee, and afterwards the donor releases to him. Co. L. 269. a.

So, if a lessee for life, rendering rent, be disseised, and the lessor releases to him all his right; the rent is extinct, though the reversion is not. Lit. s. 456.

So, if the lessor releases to the lessee for years, before his entry or term commenced, all his right in the land; the rent is extinguished. Co. L. 270. a. *Vide post*, (G 2.)—*Estates*, (G 14.)

So, a release of a right will be good, though there be no privity between the releasor and releasee; as, if the disseisor makes a lease for life, and the disseisee releases his right to the lessee. Co. L. 266. a.

Or, to A. and his heirs for the life of another, and the disseisee releases to the heir. Co. L. 275. a.

Though the release be to the heir before his entry. *Ibid.*

So, a release of a right will be effectual, though there be no mention of the heirs of the releasee; as, if a disseisee releases to the disseisor, generally. Lit. s. 467.

Or,

Or, only for a day, or an hour. Lit. s. 467.

So, a release of a right upon condition will be good, and upon the condition broken, the right shall be vested. Co. L. 266. a. 274. b.

So, a man who has a right only to a chattel, may release to him who has but a chattel, and not a freehold ; as, if lessee for years, reversion to B., be ousted, and the disseisor leases to A. for years ; a release by the first lessee of his right to A. is good. Co. L. 265. b.

[Though a deed be in the form of a release, if there be sufficient words, it may operate as a grant, in order to make it good. Cowp. 599.]

[Where a release was void as a common law conveyance ; it being to convey a freehold to commence *in futuro*, the court were of opinion that it should have the effect and operation of a covenant to stand seised to uses. C. P. T. 30 & 31 G. 2. 2 Wils. 75.]

[A release dated 16th April, purports to be made to the lessee "as being in possession by virtue of a lease for a year, bearing date the day next before the date of the release." The date of the release is 14th April. Held, that the misdescription was immaterial, since it appeared that there was a lease at the date of the release, which would give the lessee possession. 2 M. & S. 434.]

#### (B 2.) What not.

But a release by him who has a right to the inheritance or freehold, to him who has not a freehold in deed, or in law, nor an estate in reversion, or remainder, and if there be no privity between them, is void ; as, if a disseisee release his right to a lessee for years of the disseisor. Co. L. 266. a.

So, if tenant for life, reversion or remainder to B., be disseised, a release by any one of his right to B. is void ; for he had only a right to the reversion or remainder. Lit. s. 451.

So, a release to a disseisee by him who has a rent-charge out of the land, is void. Co. Lit. 268. a.

Or, by a donor of his reversion or right therein to the donee, being disseised. Co. L. 268. b.

Yet tenant in dower may release her dower to a guardian in chivalry, though he has only a chattel ; for it is recoverable against him. Co. L. 268. a.

So, a release to him who has no estate or right, is void, though there be a privity between them ; as, if tenant in fee makes a feoffment, and afterwards the lord releases to the feoffor, his seigniorship is not extinct. Lit. s. 457.

#### (B 3.) What right shall be released.

If a man releases all his right in land, this extends to all his present right. Co. L. 265. a.

So, it extends to a power of revocation, or other interest of the releasor himself. Co. L. 265. b.

Though he has a present right, only to a future interest ; as, if a man has a right only to a reversion or remainder after an estate for life, or years, *in esse*. Co. L. 265. a.

Though he has only a possibility upon a condition broken, or a contingency. R. Jon. 17.

If a husband leases for life and dies, and the wife releases her dower, or her right in the land, or all demands, to him in reversion, it will be good; for she has a present right to her dower, though she has no right to demand it against him in reversion during the life of the lessee. Co. L. 265. a. R. 8 Co. 151. 154. a.

If the conusor of a fine of lands in ancient *demesne* releases to the conusee his right in the land; this destroys his right to be restored, if the fine be annulled by a writ of *disceit*, though it was a contingency. F. N. B. 98. A. R. 10. Co. 50. a.

If a conusor of a statute, &c. enfeoffs, and before execution the conusee releases all his right to the feoffee, he cannot afterwards extend upon the feoffee. R. Cro. L. 40. Adm. 2 Cro. 439.

But a release of his right does not amount to an extinguishment of a bare authority; as, if a man devises to his executor an authority to sell land, and he releases all his right and title in the land to the heir; this does not extinguish his authority. Co. L. 265. b.

So, if the executor disseises the heir, and aliens the land. 1 Co. 111. a.

So, if *cestuy que use* before the st. 27 H. 8. had devised that his feoffees should sell his land, and they make a feoffment; yet their authority to sell remains. Co. L. 265. b.

So, a release does not extend to a future right; as, if a father be disseised, and his son (in his life-time) releases all his right to the disseisor, without warranty, and the father dies; the son is not barred by this release. Co. L. 265. a.

Though the release be of all his right, *quod in posterum quovis modo habere poterit*. Lit. s. 446.

So, if tenant for life, remainder to the right heirs of B., be disseised, and the eldest son of B. releases, it will be void. 10 Co. 51. a.

So, if the conusee releases, to the conusor of a statute, all his right to the land, he may afterwards extend it. Co. L. 265. b.

So, if the plaintiff, before judgment against the principal, releases all demands to the bail; this is not a discharge to the bail, if he afterwards obtains judgment and takes execution against the bail. Co. L. 265. b.

So, if an annuity, &c. be granted upon a condition precedent; a release by the grantee, before the condition performed, will be void. D. 1 Co. 111. b.

(B 4.) How the release of a right enures:—When a release to one enures to another.

If a disseisor makes a feoffment to two, a release to one enures to both. Lit. s. 472.

If tenant for life or in tail be disseised by two, and releases to one, it enures to both; for the disseisors have a fee, and the release of a lessee or donee cannot enure to the whole estate, neither can it enure as an entry and grant, for that shall vest the reversion; and therefore it must enure to both. Co. L. 276.

If two joint-tenants are disseised by two, and one of them releases to one of the disseisors, this enures to both; because the release is only of a moiety, and no part in certain. Ibid.

If there be two disseisors, and they lease for life or years, and then

the disseisee releases to one of them, it enures to both; for one cannot have the sole possession. Co. L. 276.

So, in all cases where a release is to one, who is not merely a wrong-doer, it enures to his companion; as if two usurp to an advowson, and the rightful patron releases to one of them, this enures to both; for their clerk was admitted and instituted, which are judicial acts, and so the usurpation is not merely tortious. Ibid.

So, if a disseisin be by two women, and one of them takes husband, a release to the husband enures to both; for he was not a wrong-doer. Ibid.

So, if a disseisin be by two, and he who had title to enter for a condition broken, consent to a ravisher, alienation in mortmain, &c. releases to one of them; this enures to both; for the wrong was not immediate to the releasor, and the release was only of a title, and not of a right. Ibid.

So, if a disseisee releases his right to the tenant for life; this enures to the benefit of him in reversion or remainder. Lit. s. 453. 470, 471.

Or, to the donee in tail. Co. L. 267. b.

Though the entry of the releasor was not *congeable* at the time of the release. Co. L. 279. b.

So, a release to him in reversion and remainder enures to the benefit of the tenant for life, if he can show it. Lit. s. 452. Ibid.

And to a reversioneer after an estate-tail, enures to the tenant in tail, Co. L. 267. b.

So, if the lord releases to the feoffee of the tenant, the feoffor shall take advantage of it. Co. L. 269. b.

So, if a lessee for life, tenant in dower, or by curtesy, commits waste, and afterwards grants over his estate, and the lessor releases to the grantee; this enures to the benefit of the lessee, &c. Ibid.

If a disseisor be disseised by B., a release by the disseisee to B. or any subsequent disseisor, enures to the benefit of all precedent disseisors, when the entry of the disseisee at the time of the release was not lawful. Co. L. 277. a.

So, if A. leases for life to one, who is disseised by B., who is disseised by C., and afterwards A. releases his right to C., B. may enter upon him, because the entry of A. at the time of his release was not lawful. Ibid.

And if the lessee for life enters, he revests the reversion in B. Ibid.

#### (B, 5.) Enures by way of passing a right.

A release of a right usually enures to pass and vest the right of him who makes the release, in him to whom the release is made; as, if a disseisee releases his right to the disseisor; his estate which was wrongful is now lawful. Lit. s. 466.

If the disseisin was by two, and he releases to one of them, he shall hold his companion out of the land. Lit. s. 472. For it enures as an entry and feoffment. Co. L. 276. a.

If a disseisor be disseised, a release to any subsequent disseisor bars all the precedent. Lit. s. 473.

So, if a tenant for life, or donee in tail, be disseised by one, and releases his right to him; this vests the right in him during the life of the releasor. Co. L. 276. a.

But if the disseisin be by two, it enures to both. Vide ante, (B 4.)

So, if the king's lessee for life be disseised by two, and release to one of them, he shall hold the other out: for the disseisin was only of an estate for life. Co. L. 276. a.

So, if joint-tenants lease for life, and afterwards disseise the tenant, and he releases to one of them; he shall hold out his companion. Ibid.

So, if lessee for life, and he in reversion, being disseised by two, join in a release to one of them; it enures to him only. Ibid.

So, a release by a disseisee to a disseisor of a feoffee of a disseisor, gives him the right, and ousts all *mesne* titles against the releasee since the first disseisin. Co. L. 276. b.

So if a disseisor leases for life to B. who aliens in fee, a release by the disseisee to him prevents the entry of the disseisor for the forfeiture. Co. L. 276. b. 277. b.

So, if he aliens in fee to two, and the release be to one of them. Co. L. 277. a.

If the release be to an abator, &c. upon the heir of the disseisor. Lit. s. 475.

So, the release of a right defeats all *mesne* charges not granted by the releasee himself. Co. L. 277, 278.

But the release of a right does not defeat a *mesne* title, which the releasee himself has granted, or accepted; as, if a disseisor grants a rent-charge, or makes a feoffment upon condition, a release by the disseisee does not defeat the rent or condition. Lit. s. 476, 477.

So, if a right be released to him who has possession upon a defeasible title, if the possession be defeated, the right accompanies it; for it was vested in him to whom the release was made; as, if A. disseises the heir of a disseisor, and afterwards the first disseisee releases to A. against whom the heir of the disseisor recovers, he shall have the right as well as the possession. Co. L. 266. a. 279. a.

So, if the disseisee enters upon the heir of the disseisor, when his entry was tolled, and enfeoffs A. against whom the heir recovers; he shall have the right also. Co. L. 266. a. 279. a.

So, if a donee discontinues in fee, and the donor releases his right to the discontinuee, against whom the issue in tail recovers, the reversion remains in the discontinuee; for the whole right of the fee was vested in him by the release, and the issue can recover only the estate-tail. Co. L. 266. a.

But if the right was precedent to the defeasible possession, if the possession be recovered, the right does not accompany it; as, if a disseisee disseises the heir of the disseisor, who recovers against him, yet the right remains in the disseisee. Ibid.

So, if the disseisee disseises him, and enfeoffs A. upon condition, and enters for the condition broken, and then the heir of the disseisor recovers against him. Co. L. 266. a.

If a woman dowerable disseises the heir, who recovers against her; her right to the dower remains. Ibid.

So, if a right be transferred to a defeasible possession by act of law; as, if A. disseises the heir of the disseisor, and enfeoffs the heir apparent of the disseisee of full age, to whom the right afterwards descends, and the heir of the disseisor recovers against him; yet his right remains. Ibid.

(B 6.) By

## (B 6.) By way of extinguishment.

But if a lessee for years, the reversion in fee, be disseised, and the lessee releases his right to the disseisor, his right is extinct, and he in reversion may enter immediately; for the disseisor has no term upon which the right of the lessee can vest, and therefore it shall enure by extinguishment. Co. L. 276. a.

So, a release by a disseisee, when his entry is not lawful, enures by way of extinguishment. Semb. ante, (B 4.)

As to the releasor himself, it enures by way of extinguishment; for his right, as to himself, is extinguished. Co. L. 279. b.

So, a release by a disseisee, when his entry is tolled, or not *congeable*, has the effect of a release, which enures by way of extinguishment; because all former estates, though wrongful or defeasible, stand in force against the releasee. Ibid.

But if any, who had title against the releasee before the release, after such release brings a writ of right, and the *mise* is joined upon the mere right, the grand assise shall find for the releasee; for he had the right, though the entry of his releasor was not *congeable* at the time of the release. Lit. s. 478.

So, if he to whom a release is made, cannot take the thing released, it enures by way of extinguishment; as, if the lord releases to his tenant all his right in the seignior, or in the land, his seignior is extinct; for the tenant cannot take the services of himself. Co. L. 279. b.

So, if he who has a rent, common, &c. releases to the terre-tenant. Lit. s. 480.

## (C) Release to enlarge an estate.

## (C 1.) What shall be a good one.

Releases of an estate in lands and tenements enure to enlarge the estate of the releasee, or by way of passing the estate.

A release to enlarge an estate is, when he in reversion, or remainder, releases to his lessee for life, to hold to him and his heirs, or to him and the heirs of his body; he thereby has an estate in fee, or in tail. Lit. s. 465.

So, if he releases to his lessee for years to hold for life, in tail, or in fee. Ibid.

Or, to his tenant by statute-staple, merchant, or *elegit*. Co. L. 273. b. 270. b.

Or, to his lessee at will. Lit. s. 460.

So, if a lessee for life, or for years, takes husband, a release by the lessor to the husband in fee, tail, &c. will be good to enlarge his estate; for the husband has the freehold, or term, in right of his wife. Co. L. 273. b.

So, if a lessee for life makes a lease for years, or at will, and then the lessor releases to the lessee for life and his heirs, it will be good; for the possession of the lessee for years, or at will, is his possession. Co. L. 270. a.

So, if a lessee for 40 years demises for 5 years to B. who enters; the lessor may afterwards release to the first lessee to enlarge his estate. Ibid.

So, if a lease be for life, or for years, remainder for life, the lessor may, by release to the lessee, enlarge his estate. Co. L. 273. a.

So, if a man leases for years to B., remainder for years, and B. enters; the lessor may, by release to him in remainder, enlarge his estate. Co. L. 270. a.

Or, if he leases for years, remainder for life, he may release to him in remainder. Co. L. 273. a.

So, if the lessor grants the reversion, after an estate for life, or years, to another for life, he may release to the grantee. Ibid.

So, if he leases to B. for life, remainder to A. for life, and B. dies; he may release to A. to enlarge his estate before his entry. Co. L. 270. b.

So, if a lease be for ten years, remainder to B. for twenty years; B. may release to the lessee, and he shall have an estate for thirty years. Co. L. 273. b.

### (C 2.) What not.

But a release will not be good to enlarge an estate, if there be no apt words; as, if he in reversion or remainder releases to his lessee for life, without more, he has no greater estate; for he had it for life before, and therefore his estate is not enlarged. Lit. s. 465.

If he releases to his lessee at will all demands. R. Cro. El. 268.

So, if a man releases to his lessee, the words do not make a greater estate, than if the same words were in a deed of the same estate executed with livery. Lit. s. 465.

And therefore, if he releases to a lessee for years generally, he has it only for life, without words of inheritance. Ibid.

If he releases to his lessee *pur autre vie*, he has it for his own life. Co. L. 273. b.

So, a release will not be good to enlarge an estate, if he to whom it is made has not a sufficient estate; as, if tenant by the curtesy assigns his estate, a release to him, after the assignment, is not good, though there be a privity between them. Co. L. 273. a.

Though he has an estate by *estoppel*, and supposition of law; as, if an infant leases to B. for life, who grants his estate with warranty to A. who in a *dum fuit infra etatem* vouches B.; a release by the demandant to B. does not enlarge his estate, though he is tenant in supposition of law. Co. L. 273. a.

So, if a release be to a lessee for years before his entry; for till he enters by force of his lease he has only an *interesse termini*, and cannot take a release to enlarge his estate. Lit. s. 459.

So, a release will not be good to enlarge an estate, if there be not a privity between the releasor and releasee.

As, if a man leases to B. for life, who leases for years to another; a release by the first lessor to the lessee for years will be void to enlarge his estate, for want of privity. Co. L. 273. a.

So, if a donee in tail leases for his own life, a release by the donor to the lessee and his heirs does not enlarge his estate. Co. L. 273. a.

So, if a lessee for 20 years demises to B. for 10 years, a release by the first lessor to B. does not enlarge his estate. Ibid.

So, if a lessor releases to a tenant by sufferance, it is not good to enlarge his estate for want of privity. Lit. s. 461. R. 2 Cro. 169.

(D 1.)

**(D 1.) Release which enures by passing the estate.**

So, a release of an estate may enure by way of passing the estate.

As, if there are two parceners, and one of them releases all his right in the land to his parcener. Co. L. 273. b.

So, if there are two joint-tenants, and one of them releases to his companion; though it does not make a degree. Ibid.

So, if a grant be to husband and wife, and B. and their heirs, B. may release to the husband alone, or to the wife alone, and it will enure by way of passing the estate. Co. L. 273. b. R. 1 And. 45.

So, if there are three joint-tenants, and one of them releases to one of his companions. Co. L. 273. b.

So, if one joint-tenant confirms the estate of his companion, with words of inheritance. Lit. s. 523.

So, if joint-tenants lease for life, and afterwards one of them releases to his companion, or confirms his estate, the reversion is vested in the releasee, and he shall have the rent or waste, without attornment. Lit. s. 574.

If one joint-tenant levies a fine, or grants by the words *dedi et concessi*, to his companion, this will enure by way of release, and not as a grant. R. Jon. 55.

So, every conveyance by one joint-tenant to his companion enures by way of release, and passes the estate, and the releasee shall have the whole, as by the first feoffment. 2 Cro. 696.

Though it be by way of use; as, if the one, by deed indented and inrolled, bargains and sells to the other. 2 Cro. 696. R. Ray. 187. 2 Sand. 96.

Or, conveys by fine *sur* grant and render. R. 2 Cro. 696.

**(D 2.) What shall be a good one.**

A release, which enures by passing the estate, may pass the fee without words of inheritance; for he to whom it is made had an inheritance before. Co. L. 273. b.

So, if a lease be to two for years, the one may release to the other before entry. Co. L. 270. b.

Or, if the lease be to commence at a future day, before the commencement of the lease.

So, if the next avoidance be granted to two, the one may release to the other before the church becomes void. Co. L. 270. b.

So, if a parcener of a rent takes to husband the terre-tenant, the other parcener may release to her, and this enures by way of passing the estate, though the rent be suspended. Co. L. 273. b.

**(D 3.) What not.**

But a release will not be good by way of passing the estate, if there be not a privity of estate between them at the time of the release. Co. L. 273. b.

[If a defendant, who is sued by a landlord in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be given up, and permit the landlord to proceed in his action. Doug. 407.]

**(E) Release of personal things.****(E 1.) Of all demands.**

The most beneficial release which a man can have, is a release of all demands. Lit. s. 508.

By a release of all demands, all actions real, personal, and mixed, and all actions of appeal, and also all executions, are discharged. Lit. s. 508.

So, all covenants, personal or real; as, warranty, &c. bonds and contracts. Co. L. 291. b.

Though the warranty be future; for it binds his lands *in presenti*. 2 Cro. 170.

All recognizances, statutes-merchant, and staple. Co. L. 291. b.

All rents, service, charge, seck, or annuities. Co. L. 291. b. Lit. s. 510.

So, common of pasture, and all profits *aprendre*. Co. L. 291. b.

All conditions before breach, or performance, or after. Co. L. 291. b. Per two J. Dal. 105.

So, a right or title to land. Lit. s. 509.

And where there is *debitum in presenti*, a release of all demands discharges it, though the money be not yet payable: as, money to be paid at a future day, by a bond, covenant, or contract. 2 Cro. 300.

So, where a rent does not attend the reversion, but is in gross, such release discharges all arrears, and all which may afterwards accrue. Cro. El. 606. R. 2 Cro. 487. 2 Rol. 408. l. 15. Per three J. 1 Sid. 141.

As, where a lessee assigns all his term to A. rendering 50*l.* *per ann.* to him; a release discharges all future payments; for it is due only by the contract. 2 Cro. 487.

But a release of all demands by the king does not discharge a right or title. Co. L. 291. b.

So, where a thing is not payable directly by the contract, and is not yet due: a release of all demands does not discharge it; as, if upon a submission to an award by bond, &c. money is awarded to be paid at a day after the release. Semb. 2 Cro. 300. R. Cont. Yel. 214.

So, such release does not discharge rent incident to a reversion, not due. Cont. 2 Rol. 408. l. 15. R. acc. Cro. El. 606. Per Hought. 2 Cro. 487. Per three J. 1 Sid. 141. R. H. 1 W. & M. B. R. inter Stephens and Snow, Sal. 578.

Nor, a collateral covenant to be formed *in futuro*. R. 2 Cro. 170. R. 2 Mod. 281.

So, a release of all demands to the bail, before judgment against the principal, does not discharge the recognizance by the bail. R. 2 Cro. 170.

So, a release of all demands by an husband, does not discharge an *assumpsit* to the wife before the coverture, to pay her 40*s.* *per ann.* after the death of her husband. R. 2 Cro. 222. Yel. 156. Vide Baron and Feme (K).

So, a release of all demands, in general words, shall be restrained to the particular occasion; as, if an executor, upon payment to him of a legacy by the executor of B., releases all demands against him as executor for any matter whatsoever; this does not release a debt due to

to his testator from the day of his death. 1274. 20. 150. 19 Mod. 277. Carth. 119. R. 2 Lev. 215.

So, if he had released all demands generally. Per Holt, Sho. 155.

On all demands on the personal estate; for a debt does not bind it till judgment. R. Sal. 575.

[A release of all right, title, interest, claim or demand in and to the personalty of an intestate does not release a debt from him. Id. R. 787. Salk. 575.]

[Particularly if the release recites that there had been disputes between the plaintiff and defendant, concerning the right of admission. Id. R. 787. Salk. 575. n. a.]

[So, if a *non compos* makes a voidable feoffment in fee and takes back an estate for life, he shall be remitted to his former estate. Id. R. 314. 316.]

### (E 2.) Claim, Right, &c.

So, a release of all claims extends to all demands. Co. L. 291. b.

So, all exactions seem equal to demands. Co. L. 292. a.

A release of all right extends to a title of entry. Co. L. 265. a. R. 8 Co. 153. b.

So, a release of all title, extends to a right in land. R. 8 Co. 153. b.

### (E 3.) Actions, &c.

By a release of all actions, actions real, personal, or mixed, are discharged.

So, appeals for death, robbery, mayhem, &c. Lit. s. 500.

So, a *scire facias* upon a judgment or fine; for every writ, original or judicial, upon which the defendant may plead, is an action. Lit. s. 505, 506.

So, a release of actions discharges all causes of action. Co. L. 285. a.

A bond for payment of money at a future day; for it is *debitum in presenti*, and a right to an action is in him, though he cannot have an action at present. Lit. s. 512.

So, a release by an executor before probate discharges an action, though he cannot have it; for the right is in him. Co. L. 292. b. Vide Administration, (B 9.)

So, a release by the ordinary, though he cannot have an action. Co. L. 292. b.

So, a release of all quarrels discharges all actions and causes of action. Co. L. 292. a.

Or, if he releases *omnes loquelas*. Co. L. 292. a.

All suits, debates, or controversies. Ibid.

So, a release of all real actions discharges actions real or mixed; as, *assise*, *quare impedit*, annuity. Lit. s. 492, 493.

So, a release of personal actions discharges all personal actions, and all mixed, in which damages were recoverable by the common law. Co. L. 285.

But a release of all actions does not release a right to enter, where entry is not tolled, &c. Co. L. 286. a.

So, a man may enter into land, or take goods, &c. notwithstanding a release of all actions. Lit. s. 496, 497, 498.

So, he in remainder, a feoffee or other not privy, shall not plead a release of actions to tenant for life, &c. Co. L. 285. b.

So,

So, a disseisor cannot bar an assise, by a release of real actions. Lit. s. 494.

So, releases of personal actions do not discharge real actions, in which damages are given by statute, if they were not at the common law; as, dower, *mort d'ancestor*, *aiel*, *entry sur disseisin en le per*, &c. Co. L. 285. b.

So, in an assise by joint-tenants, a release of personal actions by one of them bars himself only. Co. L. 285. a.

So, a release of all actions before the day of payment of a rent, annuity, &c. is no bar to arrears afterwards due. R. Cro. El. 897.

So, if an agreement be, that A. shall release the equity of redemption, and B. shall pay for it 7l. A. releases the equity and all actions; this does not discharge an action for the 7l. R. 1 Sal. 171.

[The real parties alone are competent to release the action; and those are the real parties who are parties upon record. 4 M. & S. 300.]

[Release by co-plaintiff not set aside without a strong case of fraud. 7 Taunt. 421.]

[If a defendant, who is sued by a landlord in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed in the action. Dougl. 407.]

[A *remittit damna* of so much is a release for so much, and is like acknowledgment of satisfaction, and there need not be judgment *quod eat sine die* as to that part. B. R. H. 207.]

#### (E 4.) Covenants.

So, a release of all covenants is a good discharge of a covenant before it is broken, as well as after. Co. L. 292. b.

But if the lessor after assignment by him to another, releases all covenants to his lessee, and afterwards the assignee of the reversion brings covenant against the lessee; such release before breach does not discharge the defendant; for the lessor, after the assignment, cannot discharge the action, which shall be intended to be founded upon a covenant in law. R. 2 Lev. 206, 207.

#### [(E 5.) Construction.]

[In the construction of an instrument, regard must be had to all its parts, and especially to the particular expressions therein. Therefore, general words in a deed are to be restrained by a particular recital. For which rule the reason may be, that the parties cannot be supposed to have used words without meaning; a supposition included in the rejection of particular expressions. If full effect is given to the general words, the particular expressions are thereby passed over; but not *vice versa* since thereby effect is given to the general words, namely, qualified and consistent with the particular expressions. Hence, where to an action of debt on a bond, the defendant pleaded a release from the plaintiff, which, after reciting that the defendant stood indebted to him in such a sum, he, in consideration of 15s. in the pound paid to him, "released the defendant from all manner of actions, causes of action, suits, debts, claims, and demands, in law and equity, which he had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of the release;" held; that

that the plaintiff might reply, that although the present demand was due when the release was made, yet it was not included, or meant to be included, in the sum named therein. 4 M. & S. 423.]

[If the provisions in a deed, are upon the face of them, applicable to two different situations of things, it may be averred to which of the two they were meant to be applied. Thus, if A. owes B. 20*l.*, which gross sum is composed of several items, and B. releases to A. 10*l.*, B. may show to what particular items the release was intended to be applied. 4 M. & S. 423.]

[A. after mentioning certain specific sums due to her from B., and that she had agreed to release him from those sums, and of and from all or any other sum or sums of money, claims, and demands, thereby secured or intended to be secured, and all other sum or sums of money, claim, and demand whatsoever, released him accordingly from those sums, and all claim on account of those sums, or for or on account of any other matter, cause, or thing whatsoever. Held, that a bond of indemnity, payable after her decease, was not thereby released. 1 N. R. 113.]

Vide more concerning Release in Appeal, (G 12.)—Bail, (Q 7.)—Chancery, (4 L 1., &c.)—Damages, (E 8.)—Discontinuance, (C 1.)—Fine, (E 10.)—Pleader, (2 G 14.—2 V. 11.—2 W. 30. 34.)—2 X 7.—2 Y 17.—3 B. 19.—3 M. 12.—3 Q 8. 16.)

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## RELIEF.

Vide COPYHOLD, (K 11.) — PLEADER, (3 K 17.)

### Relief in equity.

Vide CHANCERY.

### Relief of poor.

Vide USES, (N 1.)

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## RELIGION.

Vide JUSTICES OF PEACE, (B 13., &c.) — SCOTLAND, (D 3.)

### The thirty-nine articles.

Vide EGLISE, (N 10.)

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## REMAINDER.

Vide COPYHOLD, (C 11.) — DEVISE, (N 19.) — ESTATES, (B 13., &c. — 31.) — PLEADER, (3 E 3.)

### Remainder-man.

[Since possession of personalty is not proof of ownership, a pawnee's title to the property bailed cannot be better than that of the bailer. There-

Therefore, the pawnee of a tenant for life has no lien for the money advanced against the remainder-man. 2 T. R. 376.]

[An indenture of lease expressed to be made by a tenant for life, and the remainder-man, but executed by the tenant for life only, is, as against the remainder-man, utterly void; who, therefore, after the death of the tenant for life, cannot sue upon the covenants therein. 1 T. R. 86.]

[A lease void in its creation as against a remainder-man, does not become valid by his accepting rent, and suffering the lessee to make improvements after his remainder vests in possession. Dougl. 50. Cowp. 482.]

Vide Receipt, (A 2. — B 2.) — Recovery, (B 7.)

### ~~Cross~~-remainders.

Vide DEVISE, (N 14, 15.)

### Contingent remainders.

Vide ESTATES, (B 16.)

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Vide ESTATES, (B 17.)

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## REMEMBRANCER.

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## REMITTER.

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- (A 4.) Or by other act. p. 238.
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**Remitter: — When it shall be.**

- (A 1.) If an antient right and defeasible estate come together by descent.

Remitter is, when an antient right, in lands or tenements, which is remediable, and a defeasible estate or title, in the same tenements, come to the same person, without default in him, he shall be remitted to his antient and better right. Co. L. 347. b.

As, if tenant in tail makes a discontinuance, and afterwards disseises the discontinuee, and dies, whereby the right to the tail and the defeasible estate in the fee descend together to his issue; the issue shall be remitted to the estate-tail. Lit. s. 659.

So, if tenant in tail, after a discontinuance, dies without issue, and he in remainder enters, and dies seised, his issue shall be remitted. R. Bend. pl. 34.

If

If the husband discontinues the land of his wife, and takes back an estate to himself in fee, and dies after his wife, their issue shall be remitted. 2 Rol. 420. l. 17.

So, if a subsequent right comes to a former, though the former was also defeasible. 2 Cro. 489. Vide post, (B 1, 2, 3.)

(A 2.) Or, the right descends after the estate.

So, there shall be a remitter, if the right descends after the defeasible estate; as, if tenant in tail enfeoffs his issue within age, and afterwards dies, the issue shall be remitted. Lit. s. 660. Hob. 71.

Though the issue came to his full age in the life of tenant in tail, and did not waive the feoffment. Lit. s. 660.

If tenant in tail makes a feoffment to the use of himself for life, remainder to his son in tail, with condition; the son breaks the condition, whereby the use and possession accrue to his issue, and the father dies; the issue shall be remitted. R. 1 Leo. 91.

If tenant in tail enfeoffs to the use of himself for life, remainder to his son, (who is the issue in tail,) and afterwards dies, the son, though he takes the remainder by the st. 27 H 8. 10. shall be remitted by the descent of the right. 1 Leo. 91. Vide post, (C 5, 6.)

(A 3.) Or, the estate after the right.

So, if a defeasible estate comes to him after a descent of the right, he shall be remitted; as, if a discontinuee, after the death of tenant in tail, enfeoffs his issue within age. Co. L. 350. a.

(A 4.) Or, by other act.

So, if the discontinuee, being a woman, the issue in tail within age takes her to wife, he shall be remitted to the whole; for he becomes seized in her right, and there are no moieties between them. Lit. s. 665.

So, if a husband, seized in right of his wife, aliens in fee, and takes back an estate to him and his wife, the wife shall be remitted; for the taking back of the estate shall be reputed the act of the husband alone, and not of the wife, who was covert. R. 1 Sid. 63.

So, if the discontinuee be disseised, and the disseisor leases to the husband and wife for life. Lit. s. 678.

So, if the alienee makes a lease to the husband and wife for their lives, reserving the reversion to himself, it shall be a remitter to the wife; and the reversion shall be out of the lessor. Lit. s. 666.

So, if an estate be taken back to the husband and wife, only for the life of the husband. Co. L. 350. b.

Though the estate to them be by indenture. Co. L. 353.

Or, by fine; for the wife shall not be examined upon it. Lit. s. 669.

So, if tenant in tail enfeoffs his issue within age, and his wife, and dies; the issue shall be remitted to the whole, upon the death of tenant in tail. Co. L. 351. b.

So, if tenant in tail discontinues, and dies, leaving a daughter his heir in tail, who after full age takes husband, and the discontinuee releases to the husband and wife for their lives, the wife shall be remitted. Lit. s. 671.

So,

So, if a husband discontinues the land of his wife by fine, and the conusee renders to the husband and wife, though this be error, and the fine may be avoided; for not being party to the original or conusance, the wife cannot take, except in remainder, yet she shall be remitted. Co. L. 353. a. Vide post, (B 1.)

So, if the discontinuée makes a feoffment and livery to the wife without her husband. Lit. s. 677.

Though the husband afterwards disagrees to the feoffment, or the wife waives it after the death of her husband. Co. L. 356. b.

So, if husband and wife are tenants in special tail by a gift after marriage, by which they take by entireties, and the husband discontinues, and takes back an estate to him and his wife, they are both remitted; for the one cannot be without the other. Lit. s. 672.

So, since the statute of uses, if he takes back an estate by fine, or feoffment. R. Hob. 255. 1 Sid. 63.

So, if husband and wife recover against lessee for life of the husband by writ of entry in the post. Semb. per Dyer, Mo. 32.

If tenant in tail makes a feoffment to the use of himself for life, and then to A. for years, and says nothing of the fee, and dies, by the descent of the reversion the issue shall be remitted. 2 Rol. 419. l. 50.

So, if the discontinuée makes an estate to the husband for life, remainder to the wife for life, it shall be a remitter to the wife, when the remainder to her comes into possession. Lit. s. 680.

So, if tenant in tail leases to his eldest son for life, remainder to the younger, and the eldest dies without issue, the younger son shall be remitted by the accruing of the remainder to him. Lit. s. 682. Vide post, (C 5.)

Or, if the heir of the disseisor leases to A. for life, remainder to the disseisee, he shall be remitted after the death of A. Lit. s. 683.

(A 5.) And if part of the estate comes to the right, it shall be a remitter for so much.

So, if only part of a defeasible estate comes to him who has a right, he shall be remitted for so much; as, if tenant in tail to him and the heirs of his body upon A. begotten, has a daughter, and afterwards has issue a daughter by another *venter*, and discontinues, and afterwards disseises the discontinuée, and dies, whereby the estate descends to the two daughters; the daughter by A. shall be remitted to a moiety. Lit. s. 662. Vide post, (C 4.)

So, if tenant in tail *entéofis* his issue within age, and B., and dies, the issue shall be remitted to a moiety. Lit. s. 668.

So, if disseisee, when his entry is *congeable*, takes back an estate (without indenture, or matter of record which estops him) from the disseisor, he shall be remitted. Lit. s. 693, 694. 696.

Though he takes but a lease for years. Lit. s. 695.

So, in a *formedon* by the issue in tail, if the discontinuée disclaims, or pleads *non-tenur*, it shall have the effect of a remitter. Lit. s. 691, 692.

## (B) Remitter favoured by law.

(B 1.) And therefore it takes effect ; though the estate which made the remitter was voidable.

Remitter is favoured in law ; for by it the antient right is restored, which is the more worthy and more sure title. Co. L. 348.

And therefore, if the defeasible estate was obtained from an infant, or *feme-covert*, yet there shall be a remitter ; as, if tenant in tail discontinues, and afterwards disseises the discontinuee, and dies ; his issue shall be remitted, though the discontinuee was an infant, or covert. Co. L. 348. a.

If a husband discontinues the land of his wife, by fine, to A. who renders to the husband and wife, though the fine be erroneous, (for the wife not being a party to the original, or consance, cannot take by the render of present estate,) she shall be remitted. Co. L. 353. Vide ante, (A 4.)

If the discontinuee enfeoffs the wife, and makes livery to her only, though the husband afterwards disagrees. Co. L. 356. b. Vide ante, (A 4.)

If tenant in tail to him and the heirs females of his body discontinues, and takes back an estate in fee, and dies, having issue a daughter, and his wife *privement enseint*, the son born afterwards shall not void the remitter to the daughter. Co. L. 357. a.

So, if the discontinuee makes a feoffment to husband and wife, upon condition, it shall be a remitter to the wife, though the feoffor afterwards enters for the condition broken. Co. L. 357. b. Lit. s. 679.

So, if tenant in tail enfeoffs his younger son, and dies, and the younger son dies, his wife *privement enseint* ; the eldest son enters, and then the wife has a son born ; he shall not enter ; for the eldest was remitted. R. 1 And. 31.

## (B 2.) A remitter defeats entirely the wrongful estate.

So, by the remitter, the defeasible estate shall be utterly annulled and defeated. Lit. s. 659. 665, 666. Vide post, (F).

And therefore, if he who has a defeasible estate grants a common, rent, &c. out of the land, and afterwards is remitted, the land shall be discharged ; for the estate out of which it issued is totally defeated. Lit. s. 660. 686, 687.

So, if he annexes a condition, &c. to the estate made by him. Lit. s. 679.

So, the remitter avoids all charges of a stranger or ancestor, made after the commencement of the defeasible estate. 2 Rol. 422. K.

So, the estate, to which the remitter is, shall be subject to dower, ward, &c. as before. 2 Rol. 422. l. 15.

But an estate of the land itself, made by him who is remitted, as a lease for years, shall not be defeated by the remitter. Co. L. 349. a. Dy. 51. b. 2 Rol. 422. l. 30.

So, other remedy for the rent, common, &c. is not taken away ; for he may have annuity, &c. notwithstanding the remitter. Co. L. 349. a.

(B 3.) And

(B 3.) And that presently without entry.

So, the defeasible estate shall be defeated without entry. Co. L. 348. a. R. 1 Rol. 260. Hob. 256. 2 Rol. 421. l. 30.

For it shall be defeated immediately by the vesting of the estate which makes the remitter. Co. L. 354. b. 356, b. Hob. 255.

Though it vests by act of law, without the assent of the party: Co. L. 358. b.

So, if the estate vests, he cannot waive the remitter; for he shall be remitted *nolens volens*. R. 2 Cro. 489. For the benefit of him in remainder, otherwise not. 2 Rol. 422. l. 40.

Though the antient estate and the last were both waiveable, he cannot waive the remitter, where it would be to the prejudice of another. Co. L. 357. Hob. 71. 255. Mo. 872. Per three J. Montague cont. 2 Cro. 489. 2 Rol. 36. Vide Baron and Feme (T).

So, if the remitter be prevented by the default of the father, his heir may be remitted; as, if the discontinuee enfeoffs tenant in tail, of full age, who shall not be remitted contrary to his own act, yet his issue shall be remitted.

If husband and wife levy a fine, and afterwards take back an estate to them; though the wife, being *particeps* by her examination upon the fine, cannot be remitted, her issue shall. Co. L. 353. b. Vide post, (C 6.)

So, if tenant in tail leases to his eldest son for life, remainder to a younger son for life, and dies, and then the eldest son dies without issue, the younger shall be remitted, though the eldest, who accepted the lease, could not. Lit. s. 682.

(B 4.) A remitter to the principal remits to the appendant.

So, if a man be remitted to the principal, he shall be remitted to all things appendant, &c.; as, if tenant in tail of a manor, with an advowson, &c. appendant, enfeoffs B. who re-enfeoffs him, saving the advowson; the issue shall be remitted to the manor, and also to the advowson. Co. L. 349. b.

So, if tenant in tail was disseised by A. who suffers an usurpation, and the disseisee enters, he shall be remitted to the manor with the advowson. Co. L. 349. b.

(B 5.) To the particular estate, remits to him in the reversion or remainder.

So, a remitter to a particular estate shall be a remitter to all in remainder or reversion. Lit. s. 673. Hob. 255. Pol. 397.

Though the remainder vests by the statute of uses. 27 H. 8. 10. Hob. 256.

So, if a mesne remainder be barred, it shall be a remitter to all other remainders or the reversion; as if A. be tenant for life, remainder to B. in tail, remainder to C. in tail, remainder to D. in fee, and A. is disseised by E. to whom B. releases with warranty, whereby the estate-tail is barred, if A. afterwards re-enters, the remainders to C. and D. are remitted, though the disseisor has a fee, determinable upon the death of B. without issue. Co. L. 354. b.

So, if tenant in tail, remainder in B. in fee, discontinues, and afterwards takes back an estate to him in tail, remainder to the king in fee, and

and dies, his issue shall be remitted, and the remainder to B., though the remainder to the king be thereby divested. Co. L. 354. b.

But if tenant in tail dies after discontinuance, without issue, and he in remainder disseises the discontinuee, and dies without issue, he in the second remainder cannot enter. R. Bend. pl. 34.

### (C) When there shall be no remitter.

#### (C 1.) To a bare title.

But a remitter must be to the ancient right, and shall not be to a naked title; as, if a defeasible estate be in him who has title to enter for a condition broken, he shall not be remitted to the estate which he had before the condition made. Co. L. 347. b. 2 Rol. 420. G.

Or, if he has title to enter for mortmain. Co. L. 347. b. 348. a.

Or, upon an assent to a ravisher; for it is a bare title of entry, for which no action is given. Co. L. 348. a.

But if an infant makes a feoffment of the estate of his wife, and within age takes back to him and his wife; though he had only a title to enter for his nonage, he shall be remitted. 2 Rol. 419. l. 30.

So, if a woman enfeoffs A. and B. upon condition to re-enfeoff her upon request, and takes husband, and upon request A. refuses, but B. enfeoffs them of the whole, she shall be remitted to the moiety of A. to which she had title of entry for the condition broken. 2 Rol. 419. l. 35.

#### (C 2.) To an irremediable right.

So, there shall be no remitter to a right for which the party has no remedy by action. Co. L. 348. a. 349. b.

As, if B. purchases an advowson, and afterwards suffers an usurpation, and six months pass, and then the usurper enfeoffs B. and his heirs, the heir of B. shall not be remitted; for though he had right, he had not any remedy by action. Co. L. 349. b.

So, if tenant in tail enfeoffs B. of a manor with an advowson, &c. appendant, and afterwards B. grants to him and his heirs the advowson, or other thing appendant, and he dies, his issue shall not be remitted till he re-continues the manor; for there was no remedy by action for the advowson, &c. till the manor was re-continued. Co. L. 349. b.

So, if he makes a discontinuance, and afterwards disseises the discontinuee, and levies a fine, and dies within five years, the discontinuee may enter; for the issue is not remitted, his right being barred by the fine. R. Bend. pl. 156. Mo. 115. 1 And. 43.

So, if there be a grandfather tenant for life; remainder to a father in tail, and they join in a feoffment with warranty, and the warranty descends with the right to the son; he shall not be remitted, being bound by the warranty. R. 1 And. 286. 2 Rol. 421. l. 40.

#### (C 3.) To a bare right of action.

So, there shall be no remitter, where the party has no right but only to have an action; as, if tenant in tail suffers a common recovery, which was erroneous, and afterwards disseises the recoveror, and dies, his issue shall not be remitted; for though he has a right to have a writ  
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of error for reversal of the recovery: yet, till the reversal, he has no right to the estate-tail. Co. L. 349. b.

(C 4.) If the freehold does not accrue to the right.

So, there shall be no remitter, except where an estate of freehold comes to him who has the antient right; and therefore, if tenant in tail before the st. 27 H. 8. 10. had made a feoffment to the use of himself in fee or tail, the issue was not remitted. Dy. 24. a.

So, there shall be no remitter till the freehold comes in possession to him who has the right; as, if discontinuee of a husband re-grants an estate to the husband for life, remainder to the wife; she shall not be remitted during the life of the husband. Lit. s. 680. R. Hob. 71.

If tenant in tail enfeoffs A. to the use of himself for life, and afterwards to A. till he raises 500*l.*, and then to his son in fee, who enters after the death of his father; he shall not be remitted till A. has levied the 500*l.* R. 1 Leo. 7.

So, there shall be no remitter, but only as to so much as comes to him without his default; as, if tenant in tail to him and the heirs of his body by A. has issue a daughter, and by another wife has issue another daughter, and then discontinues, and disseises the discontinuee, and dies, his daughter by A. shall be remitted only to a moiety; for a moiety only descended to her. Lit. s. 662. Vide ante, (A 5.)

So, if tenant in tail enfeoffs his issue within age, and a stranger, and dies, though joint-tenants are seised *pro indiviso* of the whole, yet the issue shall be remitted only to a moiety; for he has no right to more. Co. L. 350. a.

If husband discontinues, and takes back an estate to him and his wife, and to A., the wife is remitted only to a moiety. Lit. s. 676.

(C 5.) If there was default in him who takes the defeasible estate.

So, there shall be no remitter, if he who has the defeasible estate was *particeps criminis*, and consented to the making of the defeasible estate; and therefore, if tenant in tail enfeoffs his issue of full age, and dies, the issue shall not be remitted; for it was his folly to accept the feoffment. Co. L. 348. b. 350. b.

Or, if the issue at full age takes the discontinuee to wife. Lit. s. 665.

Or, if the issue joins with his father in a disseisin to the discontinuee. Co. L. 357. b.

If a stranger enfeoffs a tenant after possibility in remainder after an estate for life, and the lessee dies, he in remainder shall not be remitted. 2 Rol. 420. l. 25.

So, if a husband and wife levy a fine to B. upon which the wife is examined, and afterwards they take back an estate to them, the wife shall not be remitted; for by her examination upon the fine, she became *particeps*. Co. L. 353. b.

Or, if they make a feoffment to the use of themselves. Semb. 1 Lev. 49:

If a husband discontinues the land of his wife, and A. disseises the  
R 2 dis-

discontinuee by *covin* of the husband, and also of his wife, and makes a lease to them, the wife shall not be remitted. Lit. s. 678. 2 And. 39.

Though the wife was not present, but only assented to the disseisin, though by such assent she be not a disseisoress. Co. L. 357. b.

So, if he who has a right procures a disseisin by A. against whom he recovers. 2 Rol. 420. l. 7.

Tenant for life, remainder to A. for life, A. disseises the tenant for life, who dies; A. shall not be remitted. Cont. 2 Rol. 420. l. 30.

So, if tenant in tail lets to B. for life, remainder to his issue by deed, and the issue agrees to the remainder, in the life of his father, by signing a counterpart of the deed &c. the issue shall not be remitted, though the freehold is cast upon him. Co. L. 359. b.

If lessee for life surrenders to D. in remainder, &c. and D. accepts it, he shall not be remitted. R. Skin. 3. 63.

So, if tenant in tail enfeoffs his issue and B. by deed, and makes livery to B. only, yet if the issue signs the deed, he shall not be remitted on the death of B., though the freehold is cast upon him by survivorship. Co. L. 359. b.

So, if B. dies in the life of the tenant in tail, and the issue afterwards enters, and takes the profits. Lit. s. 684.

Or, agrees to the feoffment in the life of his father. Co. L. 359.

If there be father, tenant for life, remainder to the son for life, remainder to the father in tail, and the father and son join in a feoffment to an uncle of the son, who dies without issue, so that the son is his heir, he shall not be remitted during his life; for he joined in the feoffment. Dub. 1 Leo. 37.

But if a party to a wrongful act, or an estate taken back, be an infant, or *feme-covert*, no default shall be adjudged in him or her generally. Vide ante, (A 4.)

As, if husband, seised in right of his wife for the life of the wife, makes a feoffment to the use of the wife for life; upon the death of the husband, she shall be remitted. R. 3 Leo. 93.

So, where an estate of freehold is cast upon him or her by act of law, no default shall be adjudged in him or her; as, if a remainder was limited to him or her, without his or her assent, and the particular estate determines. Lit. s. 682, 683. 1 Leo. 91. Vide ante, (A 4.)

So, if tenant in tail enfeoffs his issue and B. by deed, and makes livery to B. and the issue was not conusant, nor took the profits in the life of his father, he shall be remitted, if he survives B. Lit. s. 684. Or, if the issue was within age. 2 Rol. 419. l. 25.

So, if a disseisor lets to the disseisee for life, by indenture, and makes livery, the disseisee shall be remitted contrary to his acceptance. R. Cro. El. 20.

(C 6.) If he takes by st. 27 H. 8. 10. which executes the use in the same plight as it was limited.

So, since the st. 27 H. 8. 10. if tenant in tail makes a feoffment to the use of his issue within age, and dies, the issue shall not be remitted; for the statute executes the possession to the party in the same plight, manner, and form; as the use was limited. Co. L. 348. b. Hob.

Hob. 298. Dub. Dy. 23. b. 54. R. Dy. 54. b. 77. b. 106. 1 Rol. 260.

And though it be found by office that there was a remitter, it is of no avail. R. Dy. 106.

Though the issue takes by remainder in an use limited to him. Semb. Dy. 129. a.

So, if the issue enters, and is seised by the st. 27 H. 8. he cannot, by the entry of the feoffees afterwards be remitted. R. Dy. 380. a.

But if the issue, in such case waives the possession, and recovers in *formedon* against the feoffees of the tenant in tail, as he may, he shall be remitted. Co. L. 348. b. 2 Rol. 10.

Or, if the issue takes by the feoffment to his use, and does not bring *formedon*; after his death, his issue shall be remitted; for an estate in fee at the common law descends to him. Co. L. 348. b. Dy. 54. 1 Leo. 91.

So, if the husband makes a feoffment of the land of his wife, to the use of himself and his wife, she shall be remitted; for she has her election to take by the st. 27 H. 8. or to enter by the 32 H. 8. 28. upon which she shall be remitted. R. Dy. 191. b.

So, the issue of the issue, who takes by force of the st. 27 H. 8. 10. shall be remitted. Hob. 255. 1 Rol. 260. 2 Rol. 419. l. 45.

So, if he who had a defeasible estate as a verdict for him, though falsely, and he who has a right claims under the recovery, he shall not be remitted; as if a younger brother disseises his elder, and in an assise against him the plaintiff is barred by a false verdict, and before attain the younger dies without issue, whereby the land descends to the elder; he shall not be remitted contrary to the verdict. R. Dy. 5. a.

But if tenant in tail levies a fine, or suffers a common recovery, which is a bar to the entail, the issue shall not be remitted, though the land afterwards comes to him. Vide ante, (C 3.)

Though the estate descends to the issue before execution of the recovery. Co. L. 361. b. Dy. 35. a.

(C. 7.) No remitter to a term for years.

If lessee for years, to commence at a future day, enters before the day, which is a disseisin, and continues in possession till the term commences, he shall not be remitted; for the law does not divest the fee, for a term, which is of no esteem. 2 Rol. 420. l. 35.

(D) *The grounds of a remitter.*

The principal cause for a remitter is, that there is not any person against whom he, who has right, can sue his action; for he cannot sue himself. Lit. s. 661.

And because he who has right cannot sue, nor enter upon himself, the remitter has the effect which an entry, if it was congeable, would have, and reverts the estate accordingly. Hob. 256, 257. 2 Rol. 37.

And if he had but a right of action, by the remitter he shall be in, in the same manner as if he had recovered. 2 Rol. 37.

(E) *How it operates.*

If discontinnee of tenant in tail enfeoffs his issue within age and B., and makes livery of the whole to the issue, he shall be remitted but for a moiety; for it operates as a feoffment in the first place, and then as a remitter. Co. L. 350. a.

If a defeasible estate descends to two daughters, and one only enters into the whole, and dies, her issue shall be remitted only to a moiety, and the other moiety shall be recovered by a *formedon* by the other daughter. R. Bend. pl. 34.

But if the defeasible estate descended to two daughters, of whom the eldest has the antient right, they take as tenants in common, and not as parceners; for there shall be a remitter for a moiety immediately. Lit. s. 662.

### (F) What effect it shall have.

By the remitter, all estates made by him, who had the defeasible estate, are avoided.

And therefore, if tenant in tail makes a feoffment to his issue, and dies, and his issue lets for years, and dies, whereby the issue of the issue is remitted, he shall avoid the lease, which becomes *null* without entry. 1 Rol. 260. R. Lane, 94.

And though the issue of the issue accepts rent upon the lease, it does not affirm it; for it was absolutely void by the remitter. 1 Rol. 260. R. Mo. 846.

So, if tenant in tail enfeoffs another to the use of himself for life, and afterwards to B. for years; his issue being remitted to the reversion by descent, shall avoid the term to B. 2 Rol. 419. l. 50.

But if husband and wife are seised to them, and the heirs of the body of the husband, remainder to A., &c. and the husband levies a fine and dies, the wife shall be remitted and all the remainders; but upon the death of the wife, the effect of the remitter ceases. Hob. 257.

But if husband and wife are seised to them, and the heirs of their bodies, remainder to A., &c. and the husband levies a fine to the use of himself and his wife, and the heirs of their bodies, whereby they are remitted, and the remainders revived; if the wife dies in the life of the husband, the remitter ceases, and the remainder is turned to a right. R. Hob. 255.

So, if tenant in tail discontinues, and is afterwards attainted for high treason, whereby his estate and also the antient right of entail are forfeited to the king upon office found; yet if he dies before office, so that the right and estate descend to the issue who is remitted; by the office found the remitter ceases. R. Hob. 347. 2 Rol. 508, 509. Pal. 351. 1 Jon. 79.

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### REMITTITUR.

[In an action of debt, if the plaintiff demands more than is, according to his own statement due, he may enter a remittitur for the surplus either upon demur. R. acc. Ld. R. 814.]

[Or, after verdict. R. acc. Comb. 365. 12 Mod. 93. 5 Mod. 212.]

[Or at any time before final judgment.]

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### REMOVAL.

Vide FRANCHISES, (F 30, &c.)

Removal of a Replevin.

Vide PLEADER, (3 K 6, &c.)

Removal of a Record.

Vide RECORD, (G),

RENT,

**RENT.**

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**(A) Rent.**

Rent is a sum which the tenant renders out of the profits of lands or tenements which he enjoys. Co. L. 142.

**(B) Reservation.**

(B 1.) How it may be made.

Rent may be reserved annually, or every second or third year. Co. L. 47. a.

So, it may be reserved upon a lease of lands by parol, or deed-poll, Co. L. 142. b. 143.

But if a man makes a feoffment, or a tenant for life, or years, grants all his estate, he cannot reserve a rent without deed. 2 Rol. 448. H. Lit. s. 215.

Nor, where a conveyance enures by way of extinguishment; as, upon a surrender, release, &c. 2 Rol. 448. I.

[A subsequent agreement may, by relation, operate to make a reservation of rent operate from the beginning of the tenant's occupation. Cowp. 781. 784.]

### (B 2.) By what words.

A rent may be reserved by the word *reservando*. Co. L. 47. a.

Or, the words, *reddendo, solvendo, faciendo*, &c. Co. L. 47. a. 141. b. *Inveniend, dummodo*, &c. Co. L. 47. a.

So, a demise, provided that the lessee shall pay, is a good reservation. R. 2 Rol. 449. l. 35.

Or, if a man, in consideration of rent after mentioned, lets, and the lessee covenants to pay so much rent, without any *reddendum*, it will be a good reservation. R. 2 Rol. 449. l. 40.

So, a devise upon condition that he pay yearly so much to A., will be a rent to him, and not a sum in gross. R. 1 Leo. 137.

[Where the reservation is monthly of a portion of the produce, or its value at the lessor's option, to be made up to 600*l.* *per annum*, if it fell short of that annual sum; the lessor having elected the money payment, is entitled to receive each month 50*l.*, and the excess, if any, above 600*l.* at the end of the year. 10 East. 139.]

### (B 3.) Out of what thing.

Every rent ought to be reserved out of lands and tenements, which are manurable, and upon which the lessor may distrain. Co. L. 47. a. 142. a.

So, out of a demise of the vesture, or herbage of land. Co. L. 47. a. 142. a.

Or, grant of a reversion, or remainder, for the possibility that it may come into possession. Co. L. 47. a.

Or, a conveyance by way of use; for by the st. 27 H. 8. 10. the possession is executed to the use. R. 2 Co. 54. a. 72. b. 2 Rol. 448. l. 10. 2 Inst. 673.

So, it may be reserved upon a grant of a future interest. 2 Rol. 446. l. 20.

But a rent cannot be reserved out of an incorporeal inheritance; as, out of a common, advowson, office, &c. Co. L. 47. a. 142. a. 144. a.

Or, a fair, market, liberty, or other franchise, or privilege. Co. L. 47. a. 5 Co. 3. a.

Or, out of tithes. Co. L. 47. a. R. 2 Rol. 446. l. 35.

A corody, mulcture of a mill, &c. Co. L. 47. a.

So, rent cannot be reserved upon a release of a right to land. Co. L. 144. a.

[A rent cannot issue out of a term for years; therefore if lessee for years assign his term, he cannot distrain for rent. 2 Wils. 375.]

If land and an incorporeal thing be demised together, rendering rent, it shall issue wholly out of the land in point of remedy. 2 Cro. 453. 2 Rol. 451. l. 20.

And

And if an incorporeal thing only be demised, the rent shall not go to the grantee of the reversion without express words ; for it is not incident to the reversion. Co. L. 47. a.

Yet, if rent be reserved upon a demise for years of an incorporeal inheritance, as common, tythes, &c. debt lies for it, in respect of the contract. Co. L. 47. a.

Otherwise upon a demise for life.

[By the st. 8 An. 14. debt may be brought for rent on a demise for life. Co. L. 47. a.]

So, such rent descends to the heir with the reversion. Semb. 2 Sand. 304. Semb. Ray. 18.

And, if the term be assigned, acceptance of rent from the assignee binds the lessor. Semb. 2 Sand. 304. Ray. 195.

So, if the demise was of a barn, or land, with tythes, and the tythes are evicted, the rent shall be apportioned ; for it was greater in respect of the tythes. 2 Cro. 453. 2 Sand. 304.

#### (B 4.) Of what thing.

Rent may be reserved not only of money, but also of any other profit, which lies in render. Co. L. 142. a.

As, a rose, pepper, comine, wheat, &c. Ibid.

So, of a horse, hawk, hen, capon, &c. Ibid.

Of spurs, bows, &c. Ibid.

So, of a journey *tempore messis*, or labour by the lessee, or with a horse, &c. 2 Sand. 165.

But it cannot be reserved of parcel of the profits demised, as, reserving the vesture, or herbage of the land. Co. L. 47. a.

#### (B 5.) To whom rent shall be reserved.

If the reservation of a rent be general, the law generally directs it according to the intent and the nature of the thing demised. Per Hale, 1 Vent. 161.

As, if tenant in tail demises for years, rendering rent to him and his heirs, this goes to the heir in tail. R. 1 Vent. 162.

If tenant for life, with power to make leases, demises, rendering rent to him, his heirs and assigns, it shall be adjudged to him in remainder. R. 8 Co. 70. b. 1 Vent. 162.

If a copyholder, by licence, leases, rendering rent to him and his wife, and his heirs, where by the custom the wife has her free-bench, the wife shall have the rent, as incident to the reversion. R. 1 Vent. 163.

If lessee for 100 years makes a lease for 50 years rendering rent to him and his heirs, it shall go to his executor or administrator. Per Hale, 1 Vent. 162.

So, if a man seised in fee lets for years, rendering rent during the term to him, his executors and assigns, it shall go to his assignee, or heir ; for the intent appears that it shall be paid during the term, and the law directs to whom. R. cont. 12 Co. 36. Cro. El. 217. 2 Rol. 450. l. 30. 451. l. 10. Ow. 9. But no mention in Roll. 450. and Owen, that the reservation was during the term, and the case 2 Rol. 451. is falsely reported, as appears Latch, 99. 2 Sand. 370. R. acc. Cro.

Cro. El. 332. 5 Co. 111. Mallory's case. Acc. Cro. Car. 289. R. Latch, 255. 264. R. per tot. Cur. 2 Sand. 370. 1 Vent. 148, 161. Ray. 213. 2 Lev. 13.

So, if bishop lets, rendering rent during the term to him, or his successors, in the disjunctive. R. 5 Co. 111. b.

So, if tenant in fee lets, rendering rent generally without saying to whom, it goes to his heir. Co. L. 47. a. Per Kingmill, 21 H. 7. 25. b. Per Cholmly, 27 H. 8. 15. a. Dub. per Knightly, 27 H. 8. 16. a. Per two J. Dy. 45. a. Dub. 2 Rol. 450. l. 20.

Or, rendering rent to him or his heirs, in the disjunctive, Cont. Co. L. 214. a.

Or, to him so much money, and after his death, a rose, &c. to his heir. Co. L. 213. b.

So, a reservation to the heir will be good, without reserving the rent to himself; as, if a man lets for years to commence after his death, rendering rent to his heir. R. 2 Rol. 447. l. 10. Cont. Co. L. 99. b. 143. b. 213. b.

So, if tenant in tail lets, rendering rent to his heir, it will be good; for he takes by purchase after the death of the donee. D. 2 Rol. 447. l. 15. Cont. Co. L. 99. b. Acc. Hard. 90.

So, if tenant in tail to him and the heirs male of his father, lets, rendering rent to him, his heirs and assigns, the rent shall go to the heir male of the body of his father, though he be not heir to the lessor; for it is incident to the reversion. R. Hard. 91. 95.

But if a man lets, rendering rent to himself, without more, it does not go to his heir. Co. L. 47. a. Per Moile, Lit. cont. 10 Ed. 4. 18. b. Dy. 45. a. 2 Rol. 450. l. 25.

Or, to him and his assigns. Co. L. 47. a.

Or, to him, his executors, and assigns, it does not go to the heir or executor, but determines upon the death of the lessor. R. Ow. 9. Cro. El. 217. 2 Rol. 450. l. 27. 12 Co. 36. Semb. cont. 1 Vent. 161, 162.

Or, to him and his assigns to have an heriot, or 40s. at the election of him, his heirs, or assigns. R. 1 Mod. 217.

Or, to him and his executors. Co. L. 47. a.

So, if the reservation be during the term to himself and B. and the survivor of them, it does not go to the heir; for the express mention of him and B. shows the intent that no other shall have it. Per three J. Berkley cont. Cro. Car. 290. And upon error it was compounded. 2 Rol. 450. l. 50. Jon. 309.

Yet, on a grant of copyhold, rendering to the lord so much rent *et servitia consueta*, the rent goes to the heir. R. 2 Rol. 450. l. 40.

So, a rent cannot be reserved to a stranger. Co. L. 47. 143. b. Lit. s. 346.

As, if a man reserves rent to himself and his wife, it will be void as to the wife. 2 Rol. 447. l. 32. Jon. 309.

So, if before the statute W. 2. 13 Ed. 1. he had made a feoffment to hold of him and his wife. 2 Rol. 447. l. 45.

So, if he reserves rent to his heir, without saying to him and his heirs. Co. L. 213. b.

If he reserves rent to him or his heir, it will be good to him for his life, and void to the heir. Co. El. 214. a.

So,

So, if a man, and B. his son, reciting that B. is his heir apparent, let for years, to commence after the death of the father, (who was sole seised,) and rendering rent to the said B., it will be void; for a reservation to him by his proper name, and not to him as heir, is the same as if it was to a stranger. R. 2 Rol. 447. l. 20.

Yet the king may make a reservation of a rent to a stranger. 2 Rol. 447. l. 35. Semb. Co. L. 148. b.

So, a man may reserve a rent to himself for his life, and a different rent to his heir. Co. L. 213. b. 214. a.

(B 6.) Rent follows the nature of the land.

The rent reserved follows the nature of the land; and therefore, if two joint-tenants let by deed-poll, or parol, rendering rent to one, it shall go to both, Co. L. 47. a.

If two joint-tenants let by deed to A., rendering to them 10s. per ann., and only one seals the deed, the demise shall be but of a moiety, rendering only 5s. per ann. R. 2 Rol. 453. l. 35.

If a man seised as heir of the part of his mother lets, rendering rent to him and his heirs, it goes to the heir of the part of the mother. Hard. 90.

So, if seised of land of the nature of Borough-English, it goes to the youngest son. Hard. 90.

(B 7.) The reservation shall be certain.

So, the reservation ought to be certain; for if a man demises at will, rendering *secundum ratam* 18l. per ann. *quandiu* the demise continues, it will be void, for it does not appear what rent he shall pay in certain, or at what time. R. 4 Mod. 79. 1 Sal. 362.

So, if the demise be of several houses, rendering 5l. rent, viz. for one house 20s., for another 40s., and for another 40s., with a clause for re-entry upon non-payment of the same rent, or any part, it will be an entire rent, and the viz. cannot make a severance. 2 Rol. 448. l. 30. 5 Co. 34. b. R. cont. Mo. 52.

But a lease of three manors, rendering for one 5l., for another 6l., for another 10l., with condition of re-entry for non-payment of any parcel, makes several demises and several rents, for which there shall be several avowries. Dy. 309. 2 Rol. 448. l. 20, 5 Co. 55.

If a lease be by a husband, rendering rent to him for life, and to his wife for life, it will be a reservation during the life of the survivor. R. Mo. 876.

(B 8.) How the rent shall be paid.

So, if a man demises for five years, rendering 100l. to be paid by equal portions during the term, it shall be paid yearly, though that word was omitted. 2 Rol. 449. l. 50.

Or, rendering rent, to be paid at the usual feasts, without saying which, it shall be construed at Michaelmas and Lady-day. R. 2 Rol. 450. l. 5.

Or, to be paid at such feasts, without saying equally, it shall be paid equally, 2 Rol. 450. l. 15,

Or, to be paid at such feasts, without more, it shall be paid yearly during the term. 1 Sid. 116.

So, upon a lease, rendering rent to be paid quarterly, it shall be paid every quarter, though the quarters do not end at the usual feasts. 2 Rol. 450. 1, 7.

### (B 9.) At what time.

So, if a demise be, rendering rent at Michaelmas, or so many days after, it shall be paid at the last day, which is the legal time of payment. R. 10 Co. 127. Vide post, (D 7.)

So, if the lessor dies before the last day, the heir shall have the rent. R. Cro. El. 575. 10 Co. 128. b.

If he grants the reversion to B. after Michaelmas, before the last day, B. shall have the rent. 10 Co. 129. a.

So, if a bond be to pay an annuity to B. for his life, at Michaelmas and Lady-day, or in thirty days after such feasts, and B. dies after Michaelmas, and within thirty days; the annuity determines, and there shall be no payment at Michaelmas. R. Cro. El. 380.

So, if a lease be for fifty years, if the lessor live so long, rendering rent at Michaelmas, or thirty days after, and the lessor dies after Michaelmas within thirty days; the rent for that payment is discharged by the act of God. R. 10 Co. 127. 2 Cro. 310.

If rent be reserved, payable at such a day, and the lessor dies the same day after noon, it shall be paid to the heir, or him in remainder, not to the executor; for it was not due till the last moment of the day. R. Sal. 578.

But if the tenant pays the same day before the death of the lessor to him in remainder, the executor shall be aided in equity. R. Eq. Ca. (2d part of 2 Mod. Ca.) 21.

[Freehold rents on demise, recoverable by executors of tenant for life. 11 G. 2. c. 19.]

[And rent apportioned in case of the death of such landlord before the gale-day. Ibid.]

So, if the lessee pays to the lessor, or tenders his rent at any time of the day, or at Michaelmas before the thirty days after elapse, the lessor ought to accept it. 10 Co. 127. b.

So, if rent be reserved yearly during the term at Michaelmas, or thirty days, and the term ends at Michaelmas, it shall then be due before the thirty days, otherwise it would not be paid yearly. R. 2 Cro. 227. 233. 310. Yel. 167. 1 Bul. 1.

So, if a demise be of a reversion after a term for years, rendering rent yearly, *cum reversio acciderit*, the rent does not begin till the term expires. Dy. 377.

So, if the reservation be of an heriot after the death of the lessee, or of a journey *tempore messis*, without limiting when the reversion commences; the heriot shall not be paid, if the lessee dies before the former term expires; nor shall a journey be performed till the reversion falls into possession. R. per three J. Keeling cont. 2 Sand. 166.

[If A. tenant for life, subject to forfeiture, remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.'s claiming and receiving the rent from C., his executor may, on shewing that he acquiesced under a false apprehension, recover

cover from C. the amount of the rent erroneously paid to B. 1 Bos. & Pull. 326.]

[(B 10.) Discharge of.]

[To an avowry for rent, the plaintiff in replevin may plead payment of an annuity, secured out of the lands demised to him for the arrears of which the grantee of the annuity had threatened to distrain. 2 Mars. 220. 6 Taunt. 524.]

[An estoppel does not exclude the plea of eviction. 7 T. R. 537.]

[A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. Dougl. 279.]

(C) *The several kinds of rent.*

(C. 1.) Rent-service :—What shall be.

There are three kinds of rent; rent-service, rent-charge, and rent-seck. Lit. sect. 213.

Rent-service, is when a tenant holds his lands by rent and fealty, or any other service. Lit. sect. 122. 213.

Before the st. *quia emptores terrarum*, 18 Ed. 1. if a man had made a feoffment by deed, or without deed, rendering to him and his heirs a certain rent, this was rent-service. Lit. sect. 216.

So, if he had reserved no rent or service; for the feoffee, of course, had held of him by the same services by which he held of the lord paramount. Ibid.

But by that statute it was provided *quod feoffatus teneat de domino capitali*, &c., and therefore now not any rent reserved upon the feoffment; but the rent, which the feoffee pays to the lord paramount, is the rent-service. Lit. sect. 122. 140. 217.

So, now if a man makes a gift in tail, leases for life, for the life of another, or for years, rendering rent, and reserving the reversion to himself, this is a rent-service; for fealty is a service incident to the reversion. Lit. sect. 214, 215.

So, if he makes a gift in tail, without reservation of any rent; for the donee shall hold of the donor in like manner as he holds over. Co. L. 143. a.

Otherwise, if he makes a lease for life or years, without a reservation. Co. L. 143. a.

So, if the donor or lessor has the reversion, though he has not the immediate reversion; as, if he makes a gift or lease rendering rent, remainder to another in tail or for life, the reversion to himself. Co. L. 142. b.

So, if the donor or lessor grants his reversion to another, the grantee has the rent as a rent-service; for the rent is incident to the reversion. Lit. sect. 228.

(C 2.) Quit-rent and rent of assise.

If the rent reserved by the lord of his tenant was reserved for all services,

services, it is called a quit-rent; because the tenant, in respect of it, is quit from other services.

And it may be reserved from a freeholder or copyholder. 2 Inst. 19.

And being usually paid in silver, it was called white rent, and the rent paid in pepper, cummin, &c. black rent. Ibid.

And when the rents of freeholders and copyholders are assised, or reduced to a certainty, by the lord of the manor, they are called rents of assise. Ibid.

[Mere length of time short of the period fixed by the statute of limitations, and unaccompanied by any circumstances, affords no ground to presume a release or extinguishment of a quit-rent. Cowp. 214.]

### (C 3.) Fee-farm-rent.

If upon a feoffment the same rent be reserved, which was paid upon a farm of the same land, or the fourth part of it, it shall be called a fee-farm-rent. 2 Inst. 44. Co. L. 143. b.

[And a [fee-farm-rent does not in itself imply a power of distress; yet, if a clause of distress be added in the deed, by which it is reserved, it is not for that reason the less a fee-farm-rent. Vide Doug. 627. in the notes.]

If the king grants land in fee-farm, without any reservation of rent, the yearly rent shall be paid. Mo. 168.

If he reserves an express rent, it will be a fee-farm-rent. Ibid.

The rent reserved upon a farm by the king was usually paid in provisions for his house, till the time of H. 1., when it was changed to money. Mad. 186.

So, if the king reserves a pension, or one be granted to him out of land, it will be extinguished by unity of possession, being in the nature of a rent. Hard. 388.

If land be granted in fee-farm, reserving the whole rent to a stranger, it will be void. Mo. 168.

But part may be to the king, and other part to a stranger. Mo. 168.

If a fee-farm-rent be reserved to the king upon condition of re-entry upon non-payment, and the king grants the rent to A. in fee; if the rent afterwards be not paid pursuant to the condition, the king shall not re-enter; for his grant to A. would be defeated. R. Cro. El. 69.

All lands granted in fee-farm are held in socage, and not in chivalry; for the whole value is presumed to be reserved. Mo. 168. Mad. Form. Int. 8.

If a rent of so much a year be reserved, but by the same deed the lessor agrees to allow so much at every payment for bringing the rent; this shall not be recouped as a diminution or alteration of the rent; but is a covenant for allowance. R. 2 Cro. 34.

### (C 4.) Incidents to rent-service.

To rent-service distress is incident; for, for every rent-service, a man may distrain of common right. Co. L. 142. a. Vide Distress, (A 1. B 1.)

So, rent-service is incident to the reversion; for, if the reversion be granted without saying *cum pertinentiis*, the grantee shall have the rent also. Co. L. 143, a. 148. a.

[Rent-

[Rent-service in its nature admits of being apportioned. 2 M. & S. 276.]

[As against an assignee of the premises demised, an eviction of part is only a suspension of the rent, *pro tanto*, even in an action of covenant; as against the lessee it is a suspension of the whole rent. 2 East, 575.]

(C 5.) What shall not be rent-service.

But a rent reserved upon a lease at will is not a rent-service, though the lessor may distrain for it of common right. Co. L. 142. b.

So, if a tenancy comes to the king by fine, &c. the rent is not a rent-service, but is distrainable of common right; for it is not the act of the lord, but of the tenant only. R. 1 And. 160.

So, if lands, parcel of a chantry, are held by rent and fealty, and upon dissolution, &c. the king grants them, the patentee shall not hold of the first lord, but of the king; yet the rent-service (before due) continues payable as a rent-charge distrainable of common right. R. 1 And. 45. Jon. 235, 236.

(C 6.) Rent-charge; what shall be: — By reservation.

A rent-charge is, when rent is granted out of land which is charged with distress for the same rent; as, if a man, since the *st. quia emptores terrarum*, 18 Ed. 1. makes a feoffment by deed, reserving rent to him and his heirs, with a clause of distress. Co. L. 143. b. Lit. sect. 217.

Or, gives in tail, or lets for life or years, remainder in fee. Lit. sect. 217.

Be it by any deed, indented, or poll; for the feoffee, by his acceptance, agrees to the rent. Co. L. 143. b.

So, if a man grants a reversion or remainder of lands in fee, reserving rent with distress. Co. L. 144. a.

Or, conveys lands by bargain and sale, or otherwise, by way of use. Co. L. 144. a. Vide ante, (B 3.)

(C 7.) By prescription.

So, a man may have a rent-charge by prescription. Co. L. 144. a.

(C 8.) By grant.

So, if a man grants out of such land a certain rent with a clause of distress. Lit. s. 218.

Though he adds a proviso, that it shall not charge his land; for that would be repugnant. Co. L. 146. a.

So, if a man binds his land to the payment of rent, it will be a rent-charge; though there be no express grant of rent. Co. L. 147. a.

So, if a man grants by deed, that A. may distrain such land for a rent, it will be a rent-charge; for the land is charged with it by way of distress. Lit. s. 221.

Or, says that A., if he be not paid so much *per ann.* shall distrain for it in the manor of D. Lit. s. 221.

So, if he binds his manor with a rent to be distrained by the king's bailiff; for the king's bailiff is named but as a servant to him; and he who can do it by a servant, may do it by himself, or another. Co. L. 147. a.

So,

So, if he grants a rent out of B. and by the same or another deed grants that he may distrain for it in another land; it is a rent-charge which issues solely out of B., though a distress be in other land. Co. L. 147. a.

So, if he binds his land and goods upon it to the payment of a rent, it will be a rent-charge, though he says nothing of distress. Ibid.

So, if he devises a rent, with power to distrain for it at the usual feasts, it will be a rent-charge; though no express charge upon any land. R. Mo. 592.

Otherwise, if it was by deed; for a clause of distress only is not sufficient to create a rent-charge in a grant. Mo. 592.

When the grantee may elect to take it as a rent-charge, or as an annuity. Vide Annuity, (C 1, &c.)

If the grant be *de qualibet acra terræ meæ*, a rent of 20s. where he has twenty acres, the grantee shall have 20*l. per ann.* Co. L. 147. b.

If a bargainor and bargainee of land join in a grant of a rent thereout, before inrolment of the bargain and sale, it shall be the grant of the bargainor, and the confirmation of the bargainee till inrolment, and afterwards the grant of the bargainee, and the confirmation of the bargainor. Co. L. 147. b.

If the grant be out of a freehold, and term for years, it issues wholly out of the freehold only, though the term is charged with distress. Co. L. 147. b.

And if he avows for a distress upon the term, he must plead the grant of rent out of the freehold only. R. 7 Co. 24. b.

If the grant be of a rent out of a term to A. for life, he must plead the grant during the term, if A. lives so long; for he cannot say that he was seised of the rent for life. Co. L. 147. b. R. 7 Co. 25. a.

If the grant be out of land to A. of a rent which he had by the grant of his father, it will be a grant of a new rent; though he never had it by the grant of his father. 2 Rol. 423. l. ult.

So, if a man recites a grant to A. of such a rent for life, and afterwards grants the same rent after the death of A. to another for life, it will be a good grant to the other, though there was not any rent granted to A. 2 Rol. 424. l. 10.

So, if he lets for life, rendering 5*l. per ann.* and afterwards grants the rent to B. for his life, to take out of the same land by the hand of the lessee, or whatsoever hand the land shall come to; B. shall have the rent for his life, though the lessee dies before him. 2 Rol. 424. l. 5.

If a grant be of a rent-charge payable at Lady-day and Michaelmas, as afterwards expressed, and it is not expressed afterwards when it shall commence, the rent commences immediately. Semb. Jon. 344.

So, if it be to commence as by deed shall be afterwards expressed. and not otherwise, and he does not make a deed afterwards; per two J. but per Croke, it shall be void. Jon. 344.

If it be to commence, as by deed afterwards expressed, and not otherwise, and by a subsequent deed he declares that the rent shall be paid, it shall commence at that time. R. Jon. 344.

If after a grant of a rent-charge the grantor conveys his land to the king, remedy does not lie by distress upon the king. Sav. 125.

But if the king grants the lands to A. the distress is revived, and the grantee may distrain for all the arrears. Semb. Sav. 125.

[If

[If a rent-charge is granted out of lands, parcel of which lands the grantor has no right to, there can be no apportionment; as if parcel be demised under a power, and the power be not pursued, so that the rent is avoided *in toto*. 2 M. & S. 276.]

(C 9.) A rent-seck : — What shall be.

A rent-seck is, when no distress is incident to it; as, if a rent be granted by deed out of land, without a clause of distress. Lit. sect. 218. 2 Rol. 423. l. 40.

Or, if a man, since the st. *Quia emptores*, makes a feoffment by deed, rendering rent without a distress. Lit. s. 217.

Or, gives in tail, or for life, remainder in fee, rendering rent, without mention of a distress. Lit. sect. 217.

So, if the king grants lands, parcel of the duchy of Lancaster, rendering rent, it will be a rent-seck, or in gross; because the tenure is of the king, and the rent is reserved to him in right of the duchy, which makes it a rent in gross. Mo. 166.

So, if a man binds his goods and lands in such a sum yearly if such a condition be not performed; after a breach, it will be a rent-seck issuing out of the land, though there be no words of grant, or where it shall be taken. 2 Rol. 423. l. 42.

So, if a rent be granted to A. in fee, or for life, with power of distress for so many years, it shall be a rent-seck; for the freehold is seck, and the distress is only appurtenant during the years. Co. L. 147. b.

Or, if it be granted to two and their heirs, with power of distress to one, it shall be a rent-seck for the whole; for it is entire, and cannot be seck to one and a rent-charge to the other. Co. L. 147. b.

Yet their grantee, or the survivor, shall have it as a rent-charge. Ibid.

So, a rent out of three acres, with distress to one, is a rent-seck. Ibid.

Or, out of one manor, with distress in another. 2 Rol. 423. l. 35.

Or, out of a mill, *percipiend.* of him and his heirs; for it shall be understood that it shall be paid by him and his heirs out of his mill. 2 Rol. 423. l. 46.

So, if there be tenant by fealty and rent, and a grantee of the rent, saving the fealty to the lord, the grantee has the rent as seck. Lit. sect. 225.

So, if the lord grants the fealty, saving to himself the rent, he shall have the rent as seck. Lit. sect. 226.

So, if a rent-service is reserved, and afterwards the land comes to the lord by the stat. of dissolution, or other means, by which the tenure is extinct, saving the rent, it becomes a rent-seck. R. Jon. 234, 235.

So, where a rent-service is reserved, and afterwards the land is given to the king, or other lord, by act of parliament, by which the tenure is extinct, though there be no saving for the rent, yet it continues as a rent-seck. Sembl. Jon. 235.

(D) Remedy for, and discharge of rent.

(D 1.) By assise.

If a rent-service or rent-charge be in arrear, the party has remedy by distress. Vide Distress, (A 1, &c. B 1, &c.)

So, every one entitled to an estate of freehold or inheritance, in a rent-service, rent-charge, or rent-seck; if he be disseised of it, may maintain an assise. Vide Assise, (B 2, &c.)

What seisin is sufficient for maintaining an assise, or for making a distress. Vide Seisin, (C, D, E).

(D 2.) What shall be a disseisin of it.

If a man obstructs the means by which a rent may be obtained, it will be a disseisin of the rent. Co. L. 160. b.

As, it will be a disseisin of a rent-service or rent-charge, if the terre-tenant, or any other, resist, and will not suffer a distress for rent in arrear, by him who has right. Co. L. 160. b.

Or, makes an inclosure, by which he cannot come to distrain. Lit. sect. 237, 238.

So, if he makes *rescous*, after a distress taken. Ibid.

If a stranger makes *rescous* in his name. 1 Rol. 658. l. 35.

Or, makes replevin by writ or plaint. Lit. sect. 237, 238.

Or counterpleads the title of the plaintiff for delay. Co. L. 160. b. 161. a.

If he vouches a record and fails. Co. L. 160. b.

So, if he forestalls, or obstructs the lord, &c. when he is going to the land to make a distress, with force or menace of life or member. Lit. sect. 240.

So, it will be a disseisin of a rent-seck or rent-charge, if the terre-tenant makes denial of rent in arrear, upon lawful demand upon the land. Lit. sect. 233, 238, 239.

Though the terre-tenant be absent from the land at the time of the demand; for that is a denial in law. Co. L. 163. b.

So, though the demand be but of one terre-tenant, it will be a denial by all. 1 Rol. 658. l. 27.

If by word of mouth he directs the tenant not to pay. Ray. 371.

If he does not pay upon distress; for that is a denial in law. 1 Rol. 658. l. 15. 20.

So, inclosure or forestalment, &c. from coming to the land to make a demand, will be a disseisin of a rent-seck. Co. L. 161. b.

So, if the tenant pays his rent to another lord by coercion of distress, it will be a disseisin, if the lord pleases. Co. L. 323.

But payment of rent to another by coercion will not be a disseisin, but at the election of the lord. Co. L. 323.

So, denial of rent by him who is not terre-tenant, will not be a disseisin. R. Jon. 414.

Or, if the refusal does not appear to be upon demand upon the land. Per three J. Cro. cont. for there being a refusal, a demand shall be intended. Jon. 414.

So, a *rescous*, replevin, inclosure, denial, &c. will not be a disseisin before actual seisin of the rent. Co. L. 161. a. Vide Seisin, (F 1, &c.)

When a rent shall be apportioned, suspended, or extinguished. Vide Suspension.

(D 3.) Debt, distress, or re-entry.

When there shall be remedy for it by debt or distress. Vide Debt, (A 5. 7.) — Distress, (A 1, &c.)

[By

[By st. 4 Geo. 2. c. 28. s. 1. those who hold over lands after the expiration of their leases or terms, shall pay double the yearly value, to be recovered in any of his Majesty's courts of record by action of debt; and there shall be no relief in equity against the recovery of this penalty.]

[But acceptance of single rent is a waiver of the double rent. Cowp. 245. 5 Burr. 2698. Dougl. 175. 1 T. R. 53.]

[And by the same statute, s. 2. as often as half-a-year's rent is in arrear, the landlord, if he has right of re-entry for the non-payment, may, without formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, and recover judgment to hold them discharged of the lease; provided, that the right of any mortgagee of such lease shall not be barred, if within six months he pay all rent in arrear, and all costs and damages.]

[And provided, that if at any time before the trial of the ejectment, the tenant or his assignee shall pay or tender to the lessor, &c. all the rent in arrear, together with costs, all further proceedings shall be stayed. s. 4.]

If an estate be upon condition that he pay the rent, how remedy shall be by re-entry for the condition broken. Vide Condition, (O 3, &c.)

[By st. 11 G. 2. c. 19. s. 14. where the demise is not by deed, the landlord shall recover a reasonable satisfaction, in an action on the case, for use and occupation; and if in evidence on the trial of such action, any parol demise, or any agreement, not being by deed, on which a certain rent was reserved, shall appear, the plaintiff shall not be nonsuited, but it shall be evidence of the quantum of the damages.]

[Tenant by parol demise from year to year, is within 11 G. 2. c. 19. and subject to pay double rent, if he does not quit after having given notice. 3 B. M. 1603.]

[A tenant from year to year of an house at a yearly rent, becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year; the lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy, during the time that elapsed before the bankruptcy. 2 H. Bl. 319.]

[If A. agree to let lands to B., who permits C. to occupy them, A. may recover the rent in an action against B. for use and occupation. 8 T. R. 327.]

[An action for use and occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, but not afterwards. 1 T. R. 378.]

[By s. 18, tenants holding the premises, after they shall have given notice to quit, shall pay double rent.]

[If tenant gives parol notice that he will quit, it is sufficient, and subjects him to double rent if he does not. 3 B. M. 1603. 1 Blk. 533.]

[As to the remedy where goods are carried off the premises fraudulently, vide st. 11 G. 2. c. 19.]

[Where a landlord has a right of entry for non-payment of rent, a demand at common law, made after or before the last day which the lessee has to pay the rent, in order to prevent a forfeiture, or off the land, will not be sufficient to defeat the estate. 7 T. R. 117.]

[The stat. 4 Geo. 2. c. 28. s. 2., passed to obviate the niceties required by common law in a re-entry for non-payment of rent, does not apply where there is a sufficient distress upon the premises. 7 T. R. 117.]

[A demand of rent by one duly authorized, which he notified to the tenant, is sufficient, without producing the authority, unless required. 7 T. R. 117.]

[A proviso in a lease, that if the rent shall be arrear for 21 days, being lawfully demanded, the lessor shall have a right to re-enter, means a demand with all the common law formalities; (by three judges against Lord Ellenborough, C. J.) that is, that the right to re-enter shall be exercised with the forms at common law. Now, the statute 4 Geo. 2. c. 28., in substance provides, that where a landlord, by the lease, may enter with the common law formalities, he may, if six months rent is arrear, and there is no sufficient distress, enter without them, it follows, that in the present case an entry may, under such circumstances, be made without a demand. 2 M. & S. 525.]

[Under a proviso for re-entry, if no sufficient distress is upon the premises at the expiration of fourteen days from the rent-day, the landlord is *prima facie* entitled to recover, by proof of there being no distress on some day after the fourteen, though that day be subsequent to the demise in the ejectment. 15 East, 286.]

[A clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and in case of a distress being made, every part of the premises must be searched. Forrest. 19.]

[*Parol* notice to quit by the landlord, is sufficient to entitle to double rent. 3 Burr. 1608. 1 Blk. 533.]

[The demand of possession to entitle the landlord to double rent, need not be made before or within any fixed time after the ending of the tenancy. 8 East, 358.]

[If a landlord agrees for double rent, on a demand of possession made since the term ended, he cannot recover the single rent between the period of its termination and that of demand. 8 East, 358.]

[A landlord is entitled to double rent under st. 4 Geo. 2. c. 28., only from the time of demanding possession. 8 East, 358.]

[If in debt for double rent a sum equal to the single rent is paid into court, the plaintiff, by taking it out, does not abandon his claim. 10 East, 48.]

[If an action be brought on the statute for double rent for two years holding over, the jury may find for so much as, upon the evidence, the tenant appears to have over held beyond the term, provided they find not beyond what is laid in the declaration. Loft. 276.]

[Notice to quit to entitle to double value, may be previous to the expiration of the lease. 2 Blk. 1075.]

[A landlord's first recovering in ejectment, will not interfere with his right to recover double value under st. 4 Geo. 2. c. 28. 9 East, 310. Secus, double rent, Semble, *ibid*, *et in notis*.]

(D 3.) Demand,

(D 3.) Demand, when necessary. Vide 18 Vin. 482.

But in all cases of a subject, where an estate is upon condition to be void for non-payment of rent, the condition will not be broken, if the rent be not demanded. Co. L. 201. b. R. 2 Cro. 145.

Though it appears that the party was not ready to pay, if a demand had been made. 1 Rol. 458. l. 17. 22.

Though the condition be upon a lease for years. R. Hob. 331. R. Jon. 9.

Or, upon a lease of tythes, or other incorporeal inheritance. R. Mo. 408.

So, if there be a lease, and a *nomine pœne* for non-payment of the rent, the rent must be demanded before he is entitled to the *nomine pœne*. 1 Rol. 459. l. 25. D. 7 Co. 28. b. R. Hob. 82. 133. Pal. 208.

So, if there be a covenant or bond for payment of a sum in gross, if the rent be not paid. Per two J. one cont. 1 Rol. 460. l. 5.

So, upon a bond to perform all covenants, payments, &c. in such an indenture, he cannot assign a breach for non-payment of rent reserved by the indenture, if he does not show a demand of the rent, except where the defendant pleads performance. R. 1 Rol. 460. l. 20. Adm. Cro. El. 829. Cro. Car. 77.

So, though the bond be expressly to pay the rent, according to the tenor of the indenture. R. 1 Rol. 460. l. 50.

Or, to pay the rent, if it be demanded. R. 1 Rol. 460. l. 45.

So, if the king makes a lease, upon condition to be void for non-payment of rent, and afterwards grants the reversion, the patentee shall not avoid the lease, without a demand of the rent. R. 4 Co. 73. a. Mo. 205. 5 Co. 56. a.

So, the king himself cannot avoid it without a demand, if the condition be express for non-payment upon demand. Dub. Mo. 210.

(D 4.) When not.

But if the king makes a lease, upon condition to be void for non-payment of rent, generally a demand is not necessary. R. 4 Co. 73. a. Mo. 205. 5 Co. 56. a. 1 Leo. 2.

So, it is not necessary in the case of a subject, if the condition be express, that it shall be void for non-payment without demand. 1 Rol. 459. l. 32. D. 5 Co. 40. b. Dal. 4.

So, debt lies for rent without a demand. R. 2 Rol. 427. l. 30.

[A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it; and if he does, the other tenant in common may distrain for his share. 5 T. R. 246.]

So, covenant, where the covenant is express to pay such rent. R. 1 Rol. 459. l. 45. 52.

And debt upon a bond to pay such a rent. R. Hob. 8.

So, in debt upon a bond to perform covenants in an indenture, if the defendant pleads performance, the plaintiff may assign a breach for non-payment of the rent, without shewing a demand; for if the defendant rejoins, that it was not demanded, it will be a departure. R.

Cro. El. 829. 1 Rol. 460. l. 30. R. Cro. Car. 76. Hut. 90. R. Hob. 8.

So, if a lease be, that upon non-payment of the rent at such a feast, there shall be a *nomine pœne* of 40s. for every day that the rent shall be in arrear; one demand is sufficient to entitle to the *nomine pœne* for every day. R. Pal. 208.

[Vide 4 G. 2. c. 28.]

#### (D 5.) How it shall be made.

The demand must be of the precise rent due; for, if he demands a penny more or less, it will be ill. R. 1 Leo. 305.

So, he ought to express when it was due. R. Cro. L. 209. 1 Leo. 305.

Though the jury finds that nothing more is due than was demanded, it does not help, if the demand did not express at what time due. R. Cro. El. 209.

So, if the rent be 7*l.* *per annum*, and 3*l.* more was in arrear, if he demands 10*l.* in an entire sum, it is ill. Per Rol. Al. 94.

But a demand by attorney is good.

Though he does not shew his name or authority. D. 3 Leo. 224.

#### (D 6.) At what place.

So, the demand must be made at the place where the rent is payable, if any place is appointed by the parties, though it be not upon the land. Co. L. 202. a.

If it be payable at one place or another, it ought to be demanded at both. Per two J. 2 Rol. 428. l. 36.

If payable at or in the church of B. it ought to be within and without the church. 2 Rol. 428. l. 40.

If payable to the bishop at Exeter, it ought to be at his palace there. R. 1 And. 27. 3 Leo. 4.

If no place of payment is expressed, the demand must be upon the land. Co. L. 201. b. R. Yelv. 37.

And at the most notorious place upon the land; as, if there be a house there, it must be at the fore-door of the house. Co. L. 201. b.

If it be issuing out of a wood, it ought to be at the gate, or most common way through the wood. Co. L. 202. a.

If there be several places equally notorious, he who demands has election, at which he will make the demand. Ibid.

If rent be reserved by the king at the exchequer, his patentee must demand it upon the land. Co. L. 201. b. Sav. 131.

But if the king does not express a place of payment, it ought to be paid to him at the exchequer, without other demand. Co. L. 201. b.

If the demand be at the most notorious place, it is sufficient, though there be no one present. Ibid.

Though a person be in the house, it is not necessary to go in. Ibid.

Though he be ready to pay at another part of the house, land, &c. Co. L. 202. a.

So, a demand at a place not the most notorious, will be no demand, if it be traversed. Ibid.

As,

As, if a demand be at a wood, where land was also demised.  
Poph. 58.

If in a pit, or among bushes, or in a common way upon the land.  
Poph. 58.

If at a barn, when the lessee is in another barn demised. Ibid.

Yet, if the party tenders his rent to the lessor, &c. it will be well, though it was not in the most notoriquis place. Co. L. 202. a. R. 5 Co. 114.

(D 7.) At what time.

So, the demand must be continued by a space sufficient for receipt of the money before the setting of the sun upon the last day appointed for payment. Co. L. 202. a.

If issue be, whether he continued half an hour before the setting, and it is found that he continued only a quarter, it is sufficient, if that space was sufficient for counting the money; for this only is material. R. Cro. El. 209. 1 Leo. 305. Lut. 1139.

If payment be at Michaelmas, or twenty days after, the demand ought to be upon the last of the twenty days; for a demand at the feast is not sufficient. Co. L. 202. a. R. Pl. Com. 172. b. Semb. Dy. 142. a. R. 10 Co. 127. 129. a. 1 Leo. 142. Lut. 1139.

If a reservation be of 20*l.* *per annum*, when demanded, the demand must be upon the last day of the year. Poph. 37.

If a reservation be at such a day, between four and six *post meridiem*, a demand at five till six is sufficient, though he was not there at four o'clock. Cro. El. 15.

But a demand for distress may be at any time, where it is said, that if it be not paid upon demand, he may distrain. Co. L. 202. a. 144. a.

So, where payment is at Michaelmas, or twenty days after, a tender at Michaelmas prevents a breach of the condition. R. 10 Co. 129. a.

Or, at any time within the twenty days. 2 Leo. 130.

Though he pays to a servant, who tenders the money to the lessor before the days elapsed. R. 2 Leo. 131. Cro. El. 48.

So, if a reservation be at Michaelmas, or so many days after, and a covenant to pay at Michaelmas, covenant lies, if it be not paid at the feast. R. 1 Rol. 431. l. 35.

Or if the reservation be at Michaelmas, and if it be not paid at Michaelmas, or within forty days after, that the lessor shall re-enter; the lessor may have debt, or distrain for the rent, though the forty days be not expired. 2 Leo. 131.

(D 8.) By payment of the sheriff upon an execution.

By the st. 8 An. 14. no goods, on any messuage or lands, &c. leased for life, years, at will, or otherwise, shall be taken by virtue of any execution, unless the party at whose suit execution is sued, before removal of the goods by such execution or extent, pay to the landlord the arrears of rent, not exceeding a year's rent, due at the time of the execution.

And the sheriff is empowered to levy the money paid for rent, and the execution money.

And if the sheriff, upon demand of the rent, removes the goods taken in execution, before payment of the rent, an action lies against him.

So, upon motion, the court will direct the sheriff to pay the rent before the execution is completed.

[On an execution for costs on judgment of nonsuit, sheriff cannot, after he has received notice of rent due, remove the goods before he has satisfied landlord one year's rent; unless rent paid, sheriff must quit; if he does not, action lies against him; or, on motion, the court will order restitution to the amount of the goods sold, deducting costs incurred before notice. 2 Wils. 140.]

[A bill of sale is a removal of goods taken by *feri facias*, and the sheriff shall pay the year's rent out of the money levied. Barnes, 211.]

[On an outlawry, *cap. ulagat.* and goods seized by process still remaining in the sheriff's hands, landlord shall have a year's rent. Bunb. 194.]

[The landlord is to have his year's rent without any deduction. Str. 643.]

[An executor has the same benefit of the act as the landlord, for it is an interest vested. Fort. 359.]

But by a proviso in the st. 8 An. 14. it shall not hinder the queen in the levying or seizing any debts, fines, penalties, or forfeitures answerable to her majesty; but the queen may levy, &c. them in such manner as if the act had not been made.

[An extent against the king's debtor, tested after the distress, takes place of the distress actually made, before sale, but not after. Parker, 112.]

[If goods are seized on an extent on an outlawry, the landlord shall not have the goods delivered to him, though he distrained before the extent. Bunb. 5.]

[If extent issues against a tenant, and afterwards, but before the extent is executed, the landlord distrains, and the inquisition finds the goods distrained to be in the possession of the tenant, the landlord shall not have the benefit of the st. 8 Ann. Bunb. 269.]

[When there are two executions, the landlord shall not have a year's rent on each. Str. 1024.]

[The ground landlord of a house is not entitled to a year's rent on an execution against an under-lessee. Str. 787.]

[A lets land to B. at 75*l.* *per annum* for one year; a few days before the end, B. says he can hold it no longer, but desires as much as will feed sixteen cows, which A. complies with, and demises also the house and garden; some months after, B.'s goods are taken in execution, no part of the rent of 75*l.* being paid; A. shall not have the 75*l.* on motion, and *seemb.* no rent under the act, though he proceed by action. Andr. 217.]

[If the money be levied by sale of goods taken in execution against defendant, who was a tenant owing rent, after the landlord's death intestate, and before administration granted, the court will not order the sheriff to pay the year's rent to the administrator afterwards. Str. 97.]

[A landlord is obliged to demand the arrears before the removal of the goods, or it is too late. Str. 97. Fort. 360. B. R. H. 255.]

[A commission of bankruptcy, is in nature of an execution. Therefore the landlord of premises held by a bankrupt is entitled, under the st. 8 Ann. c. 14., to receive a year's rent out of the goods upon the premises

premises seized under the commission; and if he purchase them from the assignees, he may deduct the rent from the price. 2 T. R. 600.]

[In an action, by the assignees, against the sheriff, for the amount of goods sold under an execution, levied after an act of bankruptcy, the sheriff is not protected in deducting a year's rent, as allowed under an execution by the 8 Ann. c. 14. unless he paid it over, before notice of the commission. 15 East, 230.]

[An outlawry in a civil suit, is considered as civil process only; therefore a landlord is entitled to a year's rent out of goods upon the premises seized under it. 7 T. R. 259.]

[The landlord of premises on which goods have been seized under an extend in aid, is not entitled, under the 8 Ann., to call on the sheriff to pay twelve months' rent, due before the teste of the writ. 2 Price, 17.]

[The landlord is entitled to one year's rent before the defendant can sell upon an execution for costs on a nonsuit. 2 Wils. 140.]

[A landlord is entitled to be satisfied out of an execution upon the premises, the rent due only up to the time of the seizure; not what accrues afterwards and during the continuance of the sheriff in possession. 1 M. & S. 245.]

[Sheriff taking corn in the blade, under a *feri facias* and selling it before rent due, is not liable to account to the landlord of the defendant under the stat. of Ann. for rent accruing subsequently to the levy and sale, although he is given notice, and though the corn be not removed from the premises until long afterwards, when a considerable portion of rent has become due. The landlord's remedy in such case by distress. 1 Price, 274.]

[It seems, that the sheriff is not bound to retain a year's rent out of an execution without notice from the landlord. 3 Taunt. 400.]

Vide more concerning rent, in Chancery, (4 N 1, &c.) — Copyhold, (K 10, 11.) — Dett, (A 5. 7.) — Forcible Entry, (D 9.) — Parceners, (C 8.) — Pleader, (2 K 15. 19. — 3 M 25.)

### **Abowry for rent.**

Vide TEMPS, (G 14.)

### **Rent of assise.**

Vide RENT, (C 2.)

### **Rent=charge.**

Vide DISTRESS, (B 2.) — PLEADER, (3 K 18.) — RENT, (C 6.)

### **Free-farm rent.**

Vide RENT, (C 3.)

### **Quit-rent.**

Vide RENT, (C 2.)

### **Rent=seek.**

Vide RENT, (C 9.)

**Rent.**

**REPLEVIN.****Rent-service.**

Vide DISTRESS, (B 1.) — RENT, (C 1, &amp;c.)

**REPAIRS.**

Vide EGGLESE, (G 2.) — PLEADER, (3 O 11.)

**Reparabit.**

Vide PLEADER, (3 O 15.)

**Reparare non potuit.**

Vide PLEADER, (3 O 17.)

**REPEAL.**

Vide PATENT, (F 1, &amp;c.)

**Repeal of a statute.**

Vide PARLIAMENT, (R 9.)

**REPLEADER.**

Vide PLEADER, (R 18.)

**REPLEVIN.**

- (A) When and for what things it lies. *infra*.
- (B) By whom it lies. p. 267.
- (C) Against whom. p. 267.
- (D) When a replevin does not lie. p. 268.
- [(E) Replevin-bond.] p. 269.
- [(F) Summary jurisdiction over the replevin officer. p. 271.

**(A) When and for what things it lies.**

A replevin lies, when cattle or goods are distrained and impounded, and thereby the sheriff is commanded, upon pledges, to deliver them to the owner. Co. L. 145. b.

And replevin may be made by writ, or by plaint; by writ, at the common law; by plaint, upon the st. Marl. Co. L. 145. b. Vide PLEADER, (3 K 1, &c.)

Replevin lies of all goods and chattels unlawfully taken.

Whether they be live cattle, or dead chattels. F. N. B. 68. D.

Replevin lies *pro examine apium*. Ibid.

For iron of his mill. Ibid.

So, if cattle, after the taking, return to the owner, he may have replevin, for the wrongful taking. F. N. B. 69. H.

So, if cattle are taken *damage-feasant*, and detained after sufficient amends, he may have replevin for the wrongful detainer. F. N. B. 69. G.

So, if a cow, &c. distrained, has a calf, &c. replevin lies of the calf, &c. F. N. B. 69. D. Dal. 65.

So, if the *mesne* puts his cattle in the place of the cattle of the tenant *peravail*, as he may, he may have replevin for them, though they never were distrained. Co. L. 145. b. 7 H. 4. 18. a.

So, replevin lies, though there be an express grant that the party may distrain and hold the goods against pledges, till the rent be paid; for goods cannot by grant be made irreplevisable. Co. L. 145. b.

[Where goods are distrained, and at the end of five days appraised, but not sold, the act of appraisement does not take away the plaintiff's right to replevy them. 1 Mars. 135. 5 Taunt. 451.]

[The writ of replevin is not taken away by the highway act 13 G. 3. c. 78. for a distress made under its provisions. 2 N. R. 399.]

[Whether goods taken under a warrant of distress granted by commissioners of sewers may not be replevied while in the hands of the officer. 6 T. R. 522.]

[Whether they may not be replevied by the sheriff or his deputy? *Qu. Ibid.*]

If they be actually replevied, and the proceedings in replevin be removed into B. R., this court will not quash the proceedings in a summary way, but will leave it to the defendant in replevin to put his objection on the record. *Ibid.*

### (B) By whom it lies.

He who brings a replevin ought to have the property of the cattle or goods in him. Co. L. 145. b.

But a special property is sufficient. Co. L. 145. b.

As, if goods be in his custody as a pledge, or for the manuring of his land. *Ibid.*

So, a lord may have a replevin for the goods of his *villain*; for his action of replevin amounts to a claim, and vests the property in him. Co. L. 145. b. F. N. B. 69. F.

A husband, for the goods of his wife, taken *dum sola*. F. N. B. 69. K.

An executor or administrator, for the goods of his testator. 1 Sid. 81.

But if goods are taken out of the custody of a *villain* by a trespassor, the lord cannot have replevin; for the *villain* had but a right to the goods. Co. L. 145. b.

### (C) Against whom.

Replevin lies against him who takes the goods.

And also against him who commands the taking, as well as trespass. R. 2 Rol. 431, l. 5.

Or, against both together. *Ibid.*

So, it lies against him who takes *damage-feasant*, if he detains after amends tendered. F. N. B. 69. G.

But

But if there be a dispute upon the seizure of cattle in a highway, upon which application is made to A. a stranger, who permits B. (upon security given to him to return the cattle to him who has right) to depasture the cattle in the mean time till the contest is determined, and thereupon the servants of A. seize the cattle for the use of their master; replevin does not lie against A., but he may plead *non cepit*. R. 1 Leo. 42.

So, if he stays the cattle, passing through his manor, till the contest is determined. Godb. 118.

So: replevin does not lie against him who takes goods beyond sea, though he afterwards imports the goods hither. Per Pol. Sho. 91.

### (D) When a replevin does not lie.

But a replevin does not lie for goods taken in execution.

Nor, for goods seized for a debt to the king, without command of the king, or of the barons of the exchequer. Mad. 672. *Et quia averia capta pro debitis nostris non sunt replegiabilia nisi præceptum nostrum vel baron. nostr. in Scaccario nostro, ideo averia capta de hominibus epis. Lond. in Wydernam. deliberari facias, &c.*

But a replevin lies against the king, if goods be in his hands. Per Hide, to the lords. 3 Rush. 1361.

So, a replevin does not lie for goods seized by warrant of a justice of peace, upon a conviction for destruction of the game, &c. Semb. 2 Mod. Ca. 208, 209.

[Not for goods distrained on a conviction (for deer-stealing.) Str. 1184.]

[And if the under-sheriff grants it, an attachment shall go against him. Ibid.]

[Nor, for goods distrained for a fine imposed on an officer by commissioners of land-tax; and if he takes out replevin, it is a contempt, and an attachment will be granted. Bunb. 14.]

So, a replevin by writ ought not to be made before pledges found to the sheriff. Vide Pleader, (3 K 5.)

[On a *scire facias* against a sheriff for not taking pledges, he must plead *ad idem*. Fort. 331.]

So, the sheriff usually takes a bond.

And if upon such bond the party in replevin does not enter his plaint in the county-court, the bond will be forfeited.

So, if afterwards he does not proceed in the prosecution.

Or, if he be nonsuit, or has a verdict against him. Carth. 519.

[And now by st. 11 Geo. 2. c. 19. s. 23. sheriffs and other officers, having authority to grant replevins, are to take a replevin-bond, in every replevin in a distress for rent, from the plaintiff, and two responsible persons as sureties, in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay; and this bond may be assigned by indorsement to the avowant, who may sue on it in his own name.]

[A defendant in replevin is entitled to an assignment of the replevin-bond, if the plaintiff does not appear in the county-court, and prosecute the suit according to the condition, notwithstanding the defendant has neither avowed, or made conusance, he being deprived of the opportunity

tautly of so doing, by the plaintiff's neglecting to prosecute the suit. 5 T. R. 195.]

[A defendant may sue on the bond as assignee of the sheriff in the superior courts, though the replevin has not been removed out of the county-court. Ibid.]

[It not appearing in a declaration by the assignee of a replevin-bond that the plaintiff was the avowant or person making cognizance, the court of themselves referred to the replevin-suit, it being of record in the court, and the declaration concluding *prout patet per recordum*, &c. Willes, 460.]

[But if the sheriff, &c. omit to take such a bond, an attachment will not be granted; the remedy is by action against him. Willes, 375. 2 T. R. 617.]

[An action will lie against the sheriff for taking insufficient pledges, and that without any previous *scire facias* against the pledges. Bull. N. P. 60. 16 Vin. Abr. 400.]

[In such an action the plaintiff cannot recover damages beyond the value of the distress. 4 T. R. 433. 2 H. Bl. 36. *contra*; the court having decided that the plaintiff could recover damages beyond the penalty of the bond, *i. e.* for more than double the value of the goods distrained.]

[In such an action he is liable in damages to the extent of double the value of the goods distrained, but no farther. 2 H. Bl. 547.]

[Some evidence must be given in this action by the plaintiff of the insufficiency of the pledges; but very slight evidence is sufficient to throw the proof on the sheriff; for the sureties are known to him, and he is to take care that they are sufficient. Bull. Ni. Pri. 60.]

[This action ought to be brought by the person making cognizance where there is no avowant on the record. 1 Bos. & Pull. Rep. 378.]

[The condition of a replevin-bond is not satisfied by a prosecution of the suit in the county-court; but the plaint, if removed by Re. Fa. Lo. into a superior court, must be prosecuted there with effect, and a return made if adjudged there. 1 Bos. & Pull. 410.]

But if the plaintiff in replevin enters his plaint, and afterwards is restrained by an injunction out of chancery till his death, whereby his plaint abates, the bond will not be forfeited. R. Carth. 519.

[In debt on a replevin-bond, it is a bad plea, that defendant appeared at the county-court; he must follow it, wherever removed, to the end of the cause. Fort. 209. Fort. 361.]

[In debt on replevin-bond, that he had performed all conditions, is a bad plea; he should plead, he did indemnify. Fort. 210.]

[If debt is brought on a replevin-bond for not prosecuting in county-court with effect, and defendant pleads he did then and there prosecute with effect, and plaintiff replies, he (present defendant) removed it by *recordari* into C. B. and was there nonsuited, the replication is well. B. R. H. 187.]

### [(E) Replevin-bond.]

[Though a replevin-bond be executed by one of the sureties only, it is nevertheless available by the sheriff against such surety. 2 Mars. 352. 7 Taunt. 28.]

Separate

[Separate obligors in the same bond are together liable only to the amount of the penalty; thus, sureties in a replevin-bond. 1 Taunt. 218.]

[*Semble*, that if a sheriff take a replevin-bond in one surety, and upon judgment in the replevin suit for a return, the return fail to be made, the sheriff cannot recover against the surety more than a moiety of what the person distraining establishes to be due for rent in the replevin suit, and of the costs of the replevin suit, though the sheriff pay larger damages in an action against him for taking insufficient pledges. 7 Taunt. 327. 1 Moore, 68.]

[A replevin-bond is assignable, though the defendant did not avow to make cognizance, provided it appear that he would have done so had he not been prevented by the plaintiff, as by his neglect to go on with the suit. 5 T. R. 195.]

[A replevin-bond may be assigned to the avowant alone, who may sue thereon, without the party making cognizance. 1 B. & P. 381.]

[A replevin-bond may be assigned to the avowant, and the party making cognizance, who may join in a suit thereon. The judgment in the replevin suit is, that both shall have a return of the goods; both then are legally interested in that by which a compensation for the loss of them is secured. 3 M. & S. 180.]

[A replevin-bond is forfeited, and assignable, if the plaintiffs neglect to appear and prosecute according to the condition. 5 T. R. 195.]

[Where a replevin is removed, the bond is forfeited by a neglect to prosecute in the court above. 1 B. & P. 410.]

[A defendant in replevin is not entitled to an assignment of the replevin-bond, on the plaintiff's neglecting to declare at the next county-court, if he himself has not then appeared to the summons. And if he obtain an assignment, and bring an action, the court will stay the proceedings (on an affidavit being made that a writ of *recordari facias loquelam* has been sued out) without payment of the costs by the defendant, which will be ordered to abide the event of the proceedings on the Re. Fa. Lo. 3 Price, 17.]

[Even admitting that a delay by the avowant, in issuing a writ *de retorno habendo*, and consequent loss of an opportunity to execute it, will discharge the sureties in the replevin-bond; they waive their right by a payment under it. 1 Taunt. 218.]

[Sureties on a replevin-bond are not discharged by time being given to the plaintiff in replevin. 2 Mars. 81. 6 Taunt. 379.]

[An action on a replevin-bond may be brought in the superior courts, though the replevin had not been removed from the court below. 5 T. R. 195.]

[In an action by the assignee of a replevin-bond against the surety, the declaration alleges that a return of the goods was adjudged, but that S., the plaintiff in replevin, did not make return. The defendant pleads, 1. That the judgment was obtained by the plaintiff by fraud in collusion with S. 2. That before judgment obtained, all matters in difference between the plaintiff and S. were referred to arbitration, pending which the proceedings were stayed. Held, that the first pleas not stating that the judgment was obtained for the purpose of defrauding the sureties, was no answer to the action; and that the second plea was bad, since the

the reference was as much for the benefit of the sureties as of the principal, and therefore no prejudice could arise to them from the delay. 2 Mars. 392. 7 Taunt. 97.]

[Where the suit upon a replevin-bond is premature, the court will not interfere upon motion, but will leave the defendant to his plea. 5 Taunt. 776.]

[The declaration on a replevin-bond need not shew in what the goods distrained consisted; such form not being usual. 3 M. & S. 180.]

[A declaration on a replevin-bond assigning for breach, in the words of the condition, that the defendant did not prosecute his suit with effect, and hath not made a return, is not only not objectionable for duplicity, but would have been defective had it not negatived both branches of the condition; for if the party make a return, he need not prosecute his suit with effect; if he prosecute his suit with effect, he need not make a return. 3 M. & S. 180.]

[If the declaration on a replevin-bond state that the bond was conditioned for prosecuting the suit for taking the goods "in the condition mentioned," (not "distrained") and making return thereof, it sufficiently appears that the condition was for returning the goods distrained. The goods mentioned in the condition must be the goods replevied; and those were the goods distrained. 3 M. & S. 180.]

[As against one who has instituted a proceeding in a court of justice, its jurisdiction and the regularity of its proceedings, are *prima facie* to be intended, and therefore need not be averred in pleading. If the proceedings were irregular, or the court had no jurisdiction, it must be shewn on his part. In an action on a replevin-bond it was objected, that it was not shewn that the officer before whom the replevin was had, and who was the mayor of the city of Canterbury, had authority to grant the replevin; that the replevin had been granted in court, and so that the bond was well taken and assigned. The facts were, that the person for whom the defendant became surety in the bond, and in whose shoes, therefore, he must be considered as placed, was the owner of the goods distrained, and had therefore instituted the replevin suit. Held, that the declaration was sufficient, and that it was for the defendant to plead that the court had no jurisdiction, or that the replevin was granted out of court. 4 M. & S. 120.]

[A plea to an action on a replevin-bond, conditioned to prosecute the replevin suit with effect, that the suit is still pending, is good; without shewing what stage it had reached. 12 East, 585.]

[A replication to a plea in an action on a replevin-bond, that the suit is not pending, as alleged, in that the defendant wholly abandoned it, is insufficient, without shewing how it was terminated. 12 East, 585.]

[In an action on a replevin-bond, for not returning goods distrained for rent, final judgment for the amount of the goods, as valued in the bond, may be signed, and execution sued thereon without a writ of inquiry. The end of such writ would be to ascertain the value of the goods; but that has already been ascertained by the appraisement before the replevin officer, and admitted by the defendant executing the bond. 9 M. & S. 155.]

(F) Summary

**[(F) Summary jurisdiction over the replevin officer.]**

[The court above will not, on account of the insufficiency of the pledges, *de retorno habendo*, compel the replevin officer to pay the defendant the costs recovered. 1 N. R. 292.]

Vide more concerning Replevin in County, (C 7.)—Pleader, (S K 1, &c.)—Viscount, (B 3.)

**Domine replegiando.**

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Vide ACTION UPON THE CASE UPON ASSUMPSIT, (H 7.)—ARBITRAMENT, (I 5, 6.)—ASSISE, (B 16, &c.)—CHANCERY, (N.)—INFORMATION, (D 6.)—PARLIAMENT, (L 24.)—PLEADER, (C 40.—E 37.—F 1, &c.—M 3.—2 E 4.—2 L 4.—2 W 19, 20, 22, 23, 25.—3 Y 6, 8, 9, 10, 11, 13, 14.—3 I 10.—3 K 24, 25.)—PRÆROGATIVE, (D 75.)

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**RESCOUS**

## RESCOUS.

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### (A) When it lies.

When *rescous* lies, or not, upon a distress. Vide Distress, (D 3, &c.)

*Rescous* lies not only upon a *rescous* of a distress for rent-service, damage-feasant, debt, or tax due to the king, (of which, vide in Distress, (D 5.)), but also when a person arrested by process out of a court of the King, or other lord, is rescued. F. N. B. 101, 102. Reg. 117, 118.

So, if a person be rescued, who is taken upon hue and cry, or other contempt. F. N. B. 102. Reg. 117, 118.

*Rescous* is, when a man lawfully arrested, or taken, is set at large wrongfully. Co. L. 160. b.

And lies though the process be erroneous; as, if a *capias* goes before an original. R. Dal. 1.

So, it will be a *rescous*, if a stranger, of his own head, takes goods distrained by another; though the distress was wrongful. 1 Rol. 673. l. 45.

If A. rescues his own goods, for which there was no cause of distress, and also the goods of a stranger, for which it does not appear whether there was cause of distress or not. R. 2 Cro. 568.

### (B) When not.

But it cannot be a *rescous*, where the man set at large never was in custody; for if the sheriff, &c. be hindered from making an arrest, an action upon the case lies, but not *rescous*. F. N. B. 102. F.

So, an action does not lie for a rescue, where there was no cause of taking; as if the *rescous* be of a distress made for rent, where no rent was due. Co. L. 160. b. Vide Distress, (D 5, 9.)

Or, if the rent was tendered before the distress made. Co. L. 160. b.

Or, the distress was made in the highway. Co. L. 160. b.

Or, of goods not distrainable by law. Co. L. 161. a.

So, if a man takes the goods of B. and C. for a distress, together,  
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where there was no cause for a distress; an action does not lie, though B. rescues the whole. 1 Rol. 673. l. 47.

Or, the goods of his tenant and a stranger for a distress for rent, where no rent is due; an action does not lie, though the stranger rescues the goods of both. Qu. F. N. B. 102. E.

### (C) By whom it lies.

If a rescue be made of a distress made by a bailiff, or servant of another, the master shall have *rescous*; and not the servant. F. N. B. 101. F.

So, if a man taken in execution be rescued, the plaintiff shall have an action, and not the bailiff who arrested him. Qu. F. N. B. 102. C. Reg. 118. a. b. R. per three J. two cont. Hutt. 98. Cro. Car. 109.

So, the lord of a franchise, or liberty, shall have an action for a *rescous* done to his bailiff. F. N. B. 101. H. 102. B.

But if the king's bailiff, or collector, arrests, or distrains for a duty to the king, he shall have an action *qui tam*; for the king cannot have it. F. N. B. 101. G. H. 102. A. B. G.

So, if a bailiff of a sheriff distrains for the wages of a knight for parliament, and *rescous* is made, he shall have an action, for the knight cannot have it; because it is not a duty from any certain person. F. N. B. 102. D.

So, a bailiff of a franchise.

### (D) Remedy for a rescous.

#### (D 1.) By writ of *rescous*.

If a man rescues goods distrained; or a person arrested by another, he may have a writ of *rescous*, *quare cum ipse bona, &c. distraisset et eadem imparcare voluisset, D. vi et armis rescussit*. F. N. B. 101.

And he may join an assault upon his servant in the same writ. F. N. B. 102. D.

[Writ of *rescous* may contain also a continuance against the defendant. Barnes, 429.]

#### (D 2.) By action upon the case.

So, if a person arrested upon *mesne* process be rescued, an action upon the case lies against the rescuers, by the plaintiff in the suit; for he has the loss, and no remedy against the sheriff. R. 2 Cro. 485, 486. 3 Bul. 200.

So, it lies by the plaintiff against the rescuers, if the rescue be after an arrest upon a judicial process; for it is reasonable that the plaintiff should have his election to sue the rescuers, or the sheriff; for perhaps the sheriff is dead or insolvent. R. per three J. two cont. Cro. Car. 109. Hutt. 98.

And he may declare according to the truth of his case; as, that the rescue was from the sheriff's deputy. R. 2 Cro. 242.

[In case for rescuing a debtor taken upon *mesne* process sued out of the Palace-court, it was holden not to be sufficient ground for arresting the judgment after verdict, that it was not alleged that the cause of action in the inferior court arose within the jurisdiction, or that it was not

not alleged that the party below did not appear at the return of the writ. 8 T. R. 127.]

So, by the st. 2 W. & M. ss. 1. ch. 5. sec. 4. upon pound-breach or *rescous* of goods distrained for rent, the person grieved may, by action on the case, recover treble damages and costs against the offenders, or any of them, or the owner of the goods, if found to have come to his use, or possession. Vide Distress, (D 4.)—Pleader, (2 S 29.)

But if the defendant be rescued upon *mesne* process, and the sheriff returns the *rescous*, an action upon the case does not lie against the sheriff. R. 3 Bul. 200. 2 Cro. 419. 486. Vide Escape, (D).

[In this action, the plaintiff must prove the original cause of action; the writ and warrant by attested copies; and the arrest; and to entitle himself to damages, he should show that the defendant in the original action is insolvent, or not to be found; and the defendant may in mitigation, show such defendant's responsibility and public appearance. R. 4 Mod. 211.]

[The party rescued may be a witness for the defendant. Ibid.]

### (D 3.) By indictment.

So, if a *rescous* be made upon a distress, &c. for the king, an indictment lies against the rescuer. F. N. B. 102. G.

All indictment for a *rescous* will be good; though it does not say *vi et armis*; for *rescussit* imports it. R. 2 Bul. 208. 2 Cro. 343. 473.

Though it does not say in what place the *rescous* was, for it shall be intended where the arrest was made. R. 2 Bul. 208. 2 Cro. 343.

If it says, that by virtue of a plaint before the sheriff, he was lawfully arrested, it is sufficient, without saying, that it was by warrant; for a good warrant shall be intended, if he was lawfully arrested. R. 2 Cro. 473.

[In an indictment for a rescue from the house of correction, it must appear for what the prisoner was committed there. Str. 1226.]

### (D 4.) By return of *rescous*:

So, if a *rescous* be made upon *mesne* process, the sheriff may return, that the defendant was arrested, and *seipsum rescussit et non est inventus*, &c. Kit. 260. b. R. 2 Cro. 419. Dub. 1 Jon. 201.

Or, *quod ipse et alii*, &c. *rescusserunt*. Kit. 261. a.

So, the sheriff may return *mandavi ballivo*, who returned a *rescous*. R. 2 Rol. 457. l. 7. 10.

And in B. R. *mandavi ballivo itineranti*, who answered that he was rescued. R. 2 Rol. 457. l. 5.

But it is not good in C. B., for a *rescous* from the bailiff is a *rescous* from the sheriff, and ought to be returned as such. 2 Rol. 456. l. 50. R. Dy. 241. a.

So, upon a *fieri facias*, a *rescous* cannot be returned. R. Sho. 180.

### (D 5.) How it shall be returned.

The return of a *rescous* ought to be certain; and therefore, if it does not shew that he was in his custody, it will be insufficient.

So, if it does not shew where he was arrested; for perhaps it was out of the county. R. Yel. 51. Mo. 422.

If it says, that a bailiff arrested, and he was in custody of the sheriff, and rescued out of the custody of his bailiff, it is repugnant. R. Sal. 586. Anon. Ld. R. 589.

If it says, his father rescued A. such a day, and A. rescued himself, without saying at what time, it is bad. R. 2 Bul. 137.

If he makes the return of a bailiff of a franchise, he ought to shew that he had *retorn. brevium*. Cro. El. 781.

And that the *rescous* was from such bailiff.

So, he ought to shew the time and place of the *rescous*. R. Pal. 563.

And that the person, to whom the sheriff directed his warrant, was his bailiff. R. Sti. 155.

And for what cause the warrant was directed to him. R. Sti. 155.

But it is sufficient to say, that he made a warrant to arrest, without saying *sub sigillo*, for the word 'warrant' imports it. R. 2 Jon. 197.

So, it is sufficient to say that he was rescued out of the custody of a bailiff *virtute warranti sibi facti*; for this is out of the custody of the sheriff. R. 2 Jon. 197. Adm. Sal. 586. R. 2 Lev. 28.

That he was arrested in *com. predict.*, though it does not say *infra ballivam*; for it shall not be intended out of it, if it be in the county. R. Yel. 51.

That he was rescued from A., bailiff of a liberty, to whom he directed his warrant, without saying, that he had *retorn. brevium*, for it shall be intended the bailiff of the sheriff, and the words, of a liberty, rejected. R. Cro. El. 781.

That several *se rescusserunt*, without saying *et quilibet eorum se rescussit*, per Twisden; for it is in the affirmative. 1 Vent. 2.

That he was rescued from the sheriff, though taken by the bailiff. Sti. 417.

[If it appear on the return, that the warrant was to two, and the arrest by one only, yet the return is good; for it is no exception in what relates to public justice. St. 117.

[If on a return of a *rescous* of two persons, it is only said they could not afterwards be found, (without saying, *nec eorum aliquis*,) it is ill. Str. 225. Fort. 362.]

[That the bailiff arrested defendant, is good. Ibid.]

[That the defendant being in my custody, is sufficient. Ibid.]

[A return made by a sheriff that the person arrested was rescued out of the custody of the bailiff, is bad; it ought to be, out of his own custody. 2 T. R. 155.]

#### (D 6.) Proceeding against the rescuer.

If a *rescous* be returned, an attachment goes against the rescuer. 2 Cro. 419. 2 Vent. 175. Sal. 586.

[The sheriff's return of a rescue is of itself a conviction of a rescue, and process immediately issues from the crown-office against the rescuer. B. R. H. 112.]

[C. B. grants attachment against the rescuer on affidavit, always; B. R. sometimes, but inclines to require a return. Str. 591.]

[The exchequer will, on the return, make the attachment absolute at first. Bunb. 181.]

[The attachment must be returnable at a general return. Str. 624.]

And

And when taken, the usual fine in B. R. is four nobles upon each. D. 2 Jbn. 197. Sal. 586.

[The fine is discretionary. 4 B. M. 2129.]

Or, if he denies the fact upon interrogatories, he shall be discharged. Sal. 586.

[On guilty of a rescue, returned, but in no other case of contempt, the offender shall be punished without being examined on interrogatories; for the return must not be traversed. 4 B. M. 2129. 1 Blk. 640.]

[A defendant brought up on an attachment for a rescue, must answer interrogatories, if exhibited, though he admit the facts charged in the affidavits. 5 T. R. 362.]

But he shall not be discharged upon affidavit. Sal. 586.

[The rescuers, on submitting to a fine, may be permitted to read affidavits to shew there was no real arrest. Str. 642.]

Or, the return may be transmitted to the filazer, and process to out-lawry go against the rescuer. Sal. 586.

But the return in C. B. is traversable. Dy. 212. but there in marg. held cont. and it is not now allowed. 2 Vent. 175.

[Return of *rescous* is not traversable, and the rescuer must be brought into court to be fined. Barnes, 429.]

So, in B. R. Dub. Cro. El. 781.

And after traverse, he may be bailed. Dy. 212. a.

[The rescuer taken may be admitted to give recognizance, to try false return against sheriff. Barnes, 430.]

[If there is verdict for plaintiff, the recognizance shall be discharged. Barnes, 430.]

#### (D 7.) When it is not a good return.

But *rescous* is not a good return upon a judicial process; as, upon a *capias ad satisfaciendum*, or *capias ullagatum*; for the sheriff may take the *posse comitatus*. R. 2 Cro. 419.

Nor, a *rescous* of goods taken upon a *feri facias*. R. 2 Rol. 459. l. 30. R. 2 Sand. 344. R. Lit. 296. [For sheriff may raise *posse comitatus*. Barnes, 430.]

Vide more concerning *Rescous*, in Distress, (D 3, &c. — Justices (R). — Pleader, (2 S 29.)

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(A) *Return of writs and process, to whom it belongs.*

The return of all writs and process, of right, belongs to the sheriff within his county. Skin. 414.

And the king cannot grant to any other to have *retorn*, *brevium* in a county, 2 Inst. 452, 1 Vent. 406.

A subsequent sheriff may make a return of a writ delivered to his predecessor; for it is not directed to any one by name. 1 Sal. 266.

And if the king grants the return of writs in such a precinct to another, the sheriff remains officer to the court, and the grantee is but a bailiff of a franchise, and ought to make a return to the sheriff. 1 Rol. 119.

But by prescription, or the king's grant, a hundred, or franchise, may have *return. brevium* within their precinct. 1 Vent. 405. R. 1 Rol. 119.

So, a bishop. 2 Rol. 202. l. 40.

So, an honour. Hard. 423.

So, a lord of a manor. R. Hard. 423.

A grantee of *return. brevium*, shall have the execution thereof as incident, though it be not expressed. R. 1 Vent. 405.

[By 13 G. 2. c. 11. s. 6. the sheriff, at the request and costs of the lord of a franchise, having return of writs, shall appoint a deputy to reside in or near the same, who, on receipt of process, shall issue his warrant to the lord of the franchise to execute the process.]

## (B) Remedy for entering a franchise.

### (B 1.) When it lies.

If a sheriff enters the franchise of him who has *return. brevium* to do execution, &c., an action upon the case lies against him. 1 Vent. 406. R. Sho. 18.

And it is not necessary to show a title to *return. brevium* in his declaration; but it is sufficient to say, that he was seized *de officio bali libertatis*, and as bailiff, had a right to the return and execution, &c. R., Sho. 18. Vide Pleader, (C 39.)

So, he need not show that the sheriff had notice of the grant; for it is upon record. R. 1 Rol. 119.

[The sheriff is bound to take notice of all the different liberties within his county; so that he will be liable to the owner of any one which he invades. 2 T. R. 10.]

### (B 2.) When not :—Where the sheriff enters with a *non omittas*.

But upon default of the bailiff, &c. the sheriff may enter a franchise; and therefore, if the bailiff of a franchise does nothing upon the sheriff's mandate, a writ goes to the sheriff *quod non omittat propter aliquam libertatem* by the common law. 2 Inst. 453.

And this is now confirmed by the st. W. 2. 13 Ed. 1. 39.

So, if the bailiff of a franchise makes an insufficient return. 2 Inst. 453.

[If sheriff's mandate to bailiff of a liberty leaves a blank for name of liberty, *cap. ad resp.* shall be quashed, unless bail is put in. Barnes, 416.]

### (B 3.) Where he enters without a *non omittas*.

So, by the st. Marl. 52 H. 3. 21. and the st. W. 2. 17. if the bailiff of a franchise does not make replevin, nor answer, the sheriff may enter

enter the franchise, without a *non omittas*. F. N. B. 68. F. 2 Inst. 140. 128.]

So, if the king be party, the sheriff may enter the franchise without a *non omittas*; as, upon process against a felon. Pl. Com. 216. a. 1 Vent. 406.

Or, the process for the king shall be with a *non omittas*. Semb. Pl. Com. 216. a. 128.]

So, where the sheriff acts as a judge; as, upon an inquisition for waste; for by the statute he is commanded *quod accedat ad locum vastatum*. 1 Vent. 406.

So, upon a writ of inquiry of damages; for it is an inquest of office, and no *venue* is necessary. R. 2 Rol. 461. l. 50. Hob. 83.

(C) Return, how made.

(C 1.) At what time.

The return of a writ ought to be made before or upon the day of return named in the writ. Mod. Ca. 148. 159. 196. 250.

But a return which appears to be made after the day of return is bad. Mod. Ca. 148. 159. 196. 250.

So, if the day of the return be Sunday, and the return appears to be made by the record upon Tres. Trin. which is a Sunday, it will be bad. Mod. Ca. 148. 159. 196. 250.

And in such case it cannot be made upon a subsequent day. R. Mod. Ca. 148. 159.

And the court will take notice of the defect, without assignment upon record. R. Mod. Ca. 196.

[If a writ is returnable at a return-day, and not a day certain, the sheriff need not return it till *quarto die post*. Fort. 363.]

[A bill of Middlesex may be returned the day on which it is sued out. 4 T. R. 610.]

[Rule relative to the returning of writs by sheriffs, and motions for attachments on neglect. K. B. Mich. 32 Geo. 3. 4 T. R. 496.]

[The rule of K. B. M. 32 Geo. 3. 4 T. R. 496, only applies where the rule expires in term-time, and before the last day of term. If therefore a rule to return a *f. fa.* expires in vacation, the sheriff has still the first day of next term, and all that day to file his return. 5 East, 386. 1 Smith, 427.]

[Where a rule to return a writ issued out of C. B. expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term; the C. B. office being open during the vacation. 1 Mars. 270. 5 Taunt. 647.]

[Time for returning a writ will not be granted for the mere asking, without sufficient cause shewn. 7 T. R. 174.]

[Where the sheriff shows reasonable grounds for doubt, whether he ought to execute a writ at the suit of a private person, on an extent of the crown, for revenue duties; the court will enlarge the time for making his return to the former writ, that the doubt may be litigated in the exchequer. 7 T. R. 174.]

(C 2.) In what manner.

So, the return ought to be under the name of the proper officer. Pl. Com. 63. a.

By

By the st. 12 Ed. 2. 5. the sheriff shall put his name to the return, that the court may know whose return it is.

And in London, where there are two persons, both ought to put their names; for they are but one sheriff. Hob. 70. 39 H. 6. 41.

So, if a return be by coroners, all ought to sign it. Hob. 70. It ought to be in the name of all. R. 39 H. 6. 41. Vide infra.

But if the sheriff does not put his name, the return will be good, and the sheriff shall be amerced. 1 Leo. 139. Semb. cont. Hob. 70. Dub. Dal. 68.

So, in the pleading of a return, the name of the sheriff need not be mentioned. R. 1 Leo. 139.

So, if a return be in the name of the sheriff, by him who is not sheriff, it cannot be assigned for error, though the court upon complaint of the irregularity, will give time to the sheriff to disavow his return. 1 Sal. 265.

So, if a return be by coroners, it is sufficient to have the name of office, without their proper names. R. Cro. El. 703. Mo. 548.

So, if a return be but by one coroner, it shall be helped as an insufficient return. R. Hob. 70.

So, now by the st. 21 Jac. 1. 13. the want of the sheriff's name shall be aided. Vide Amendment, (G 1, 2.)

So, if a new sheriff returns a writ, with a return made by his predecessor, which concludes, A. B. late sheriff, it will be good; for the sheriff need not mention his office; for his name and surname are sufficient, and then if he adds late sheriff, it does not prejudice. R. Cro. Car. 189. 570.

So, if the sheriff indorses, and does not subscribe his name, it is sufficient. R. Carth. 56.

If he indorses his name A. B. Mic. for Mil. it shall be amended. Dub. F. g. 5.

[He may make and deliver the return of the writ any where. 1 Wils. 328.]

If a writ is directed to Henry Earl of Litchfield, and it is returned by George Henry Earl of Litchfield, it is good; for there can be but one Earl of Litchfield, and therefore a variance of the christian name is not material. Str. 316.]

By stat. 20 G. 2. c. 37. the sheriff shall, at the expiration of his office, turn over to his successor all process unexecuted, who shall execute and return. Sheriff neglecting to turn over, liable to make satisfaction to party aggrieved.]

#### [(C 3.) Amendment of.]

[If, to a writ of *venditioni exponas*, for goods already taken in execution with a clause of *fi. fa.* for the residue, the sheriff return that he has made of the goods 20*l.*, but omit, by mistake to return *nulla bona* to the *fi. fa.*; the court will allow the sheriff to amend the return, and will set aside an attachment issued against him for not making the return. 1 Mars. 344.

#### [(C 4.) Implication of.]

In case, for maliciously suing out an alias *fi. fa.* after a sufficient levy under the first, the sheriff's return, indorsed on the two writs, stating that he had forborne to sell under the first, and had sold under the second,

second, at the request of the now plaintiff, were held *prima facie* evidence of the fact so returned. 11 East, 297.]

[The sheriff's return to a *fi. fa.* that he has levied the money, furnishes no proof that he has paid it over to the creditor. 1 M. & S. 599.]

### (D) Return in excuse: — And excuse of a return.

#### (D 1.) *Tarde.*

A return ought to show obedience to the writ, or a good excuse for his omission; as, he may say, *quod breve adeo tarde venit quod exequi non potuit.*

But by the st. W. 2. 39. the plaintiff or demandant may require a bill from the sheriff upon the delivery of the writ to him, in the county, or upon record, and then an action will lie against him, if he returns *tarde.* 2 Inst. 452.

So, *tarde* is not a good return upon a *capias ad respondendum.*

So, the sheriff cannot return the answer of the bailiff of a franchise, *quod tarde*, &c. 2 Rol. 461. l. 20. Vide post, (F 2, 3.)

Nor, *tarde* to part; as, a summons to one defendant, *tarde* as to another, &c. R. 2 Leo. 175. 4 Leo. 57.

#### (D 2.) Neglect of the party.

So, he may say, that he was always ready to deliver seisin, &c. and gave notice such a day, but the plaintiff did not come to receive it. R. 2 Rol. 459. l. 25.

In replevin, that no one came to shew the cattle. 2 Leo. 67.

On a writ which says, if the plaintiff *fecerit te securum*, &c. that the plaintiff did not find pledges.

But it is not a good return to say, *quod visum habere non potui.* 2 Rol. 460. l. 50.

That the plaintiff did not prosecute his writ. 2 Rol. 460. l. 35.

#### (D 3.) *Mandavi ballivo.*

So, he may say, *mandavi ballivo*, &c. *qui nullum dedit responsum.* 2 Rol. 460. l. 50.

Or, who made such a return. 2 Rol. 461. l. 45.

So, upon an *elegit*, there shall be a mandate to the bailiff, who shall make the inquisition and extent. R. Cro. Car. 319.

But, upon a writ of inquiry directed to a sheriff, he cannot say *mandavi ballivo*, &c., for he is to execute it at any place within his county. R. Hob. 83. Vide ante, (B 3.)

Nor, upon process at the suit of the king. Vide ante, (B 3.)

Nor, upon a *distringas juratores.* 19 H. 6. 67. a.

So, by the st. W. 2. 39. the treasurer and barons of the exchequer shall deliver to the justices a roll of all liberties that have return of writs; and if the sheriff returns *mandavi ballivo* of any other liberty, he shall be punished by fine and ransom. 2 Inst. 452.

So, if he returns *mandavi ballivo* of a county, who has a patent for the return of writs; for such grant is void. 2 Inst. 452.

#### (D 4.) *Rescous.*

So, he may return a *rescous.* Vide *Rescous*, (D 4, 5.)

[The

[The sheriff is the only officer known to the court; therefore, if he return a rescue, it must be that the rescue was from his custody, though, in point of fact, it was from the bailiff's. 2 T. R. 156.]

(D 5. a.) Defendant removed by *habeas corpus*, &c.

So, the sheriff may say, that the defendant, being arrested by him, was afterwards removed by *habeas corpus*, returnable such a day in chancery, and there discharged out of his custody. 1 Leo. 145.

And was committed to another in custody. 1 Leo. 145.

That another writ of the same *teste* and return came to him before, to which he made a return. R. Mod. Ca. 61.

[(D 5. b.) To a *venditioni exponas*.]

[It is not a contempt in the sheriff to return to a *venditioni exponas*, that the goods remain unsold for want of buyers. 1 B. & P. 359.]

(D 6.) What is not a good excuse.

But it is not a good return, that he was resisted, and therefore disabled to make execution of the writ; for by the st. W. 2. 13 Ed. 1. 39, he may take the *posse comitatus*. 2 Inst. 454. Vide *Rescous*, (D 7.)

*Quod visum averiorum habere non potuit*; for he does not shew any endeavour. 2 Rol. 560. l. 40.

So, it is not a good return, that the sheriff levied goods upon a *feri facias*, and afterwards lost them. D. 1 Vent. 52.

Or, that such person rescued the goods. R. 1 Vent. 21. D. 1 Vent. 52. R. Sho. 180. Vide *Rescous*, (D 4. 7.)

So, *non est inventus* is not a good return, where the sheriff has a writ delivered to him against his bailiff, and he ought to amend his return, and shall be amerced. 1 Vent. 12. 24.

(E) Return to a writ in chief.

(E 1.) Must be certain: — What will be uncertain.

A return to a writ ought to be certain; and therefore, if it says, *non assets*, or, *non est inventus*, *prout mihi constare poterit*, it is bad. 2 Rol. 460. l. 25.

*Quod non deliberavit pro eo quod visum habere non potuit*; for perhaps he did not endeavour it. 2 Rol. 460. l. 40.

[The court will not, on the motion of the defendant, compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a *f. fa.*, on the ground that his officer has wasted the goods. 2 Mars. 293. 6 Taunt. 576.]

(E 2.) What sufficiently certain.

But, if the return shews the command of the writ performed, it is sufficient, though he does not say by whom, or how; as, if it says, *infra nominatus A. captus est*. Sal. 589.

*Attachiari feci*; for *qui facit per alium facit per se*. R. Sal. 589; Skin. 552.

So, if it shews the command of the writ performed in substance: as, if

if it says, *scire feci*, or *summ. feci*, &c. *per A. and B.* without saying, *probos et legales homines*. 2 Rol. 459. l. 50. 53.

So, if it refers to the writ, it is sufficient, without repeating the words of it; as, *scire feci prædict. A. essendi sec. tenor brevis*, without saying where, or what to do. 2 Rol. 460. l. 2.

*Ad faciend. quod breve requirit.* 2 Rol. 460. l. 5.

So, it is sufficient if the return may be ascertained by the writ; as, where a writ is, *scire facias A. B. mil.*, it is sufficient to say, *scire feci mil. infra nominat.* 2 Rol. 460. l. 15.

That the said A. B. *est mortuus*, without saying *miles*. 2 Rol. 460. l. 10.

*Scire feci A. B. prout mihi præcipitur*, without saying, *infra nominat.* Sal. 589.

So, surplusage in a return shall be rejected; as, *parat habeo ubicunq.* ~~or *ubiq.*~~ shall be rejected. R. Sal. 589.

[The most exact adherence to form is requisite in the return of a writ. 5 East, 291.]

### (E 3.) Must answer to the whole writ.

So, the return ought to answer to the whole command of the writ and therefore a return of a panel with nine names, or other number less than the writ requires, is bad. 2 Rol. 461. l. 2.

So, a return upon a *grand cape*, *cepi in manus*, &c. if it says nothing to the summons of the tenant. 2 Rol. 461. l. 5.

A return upon a *scire facias* against an heir and terre-tenants, if it says nothing as to the heir. R. per three J. Cro. Car. 295.

A return upon an *extendi facias* upon a statute, that he has delivered such lands; if it does not say that there are no other lands. 1 Brownl. 37.

So, if upon a *petit cape*, where the count was for a house and stable, the return is, *cepi* the said house, and says nothing as to the stable. R. Jon. 357.

So, if upon a *feri facias*, returnable Oct. Mich., the return is *nulla bona* at Mich.: for perhaps the defendant had some before Oct. Mich.

### (E 4.) Must not be contrary to a record.

But a sheriff cannot make a return contrary to his former return upon record; as, if he return upon a *venire facias* twelve jurors, he cannot say upon the *distringas*, that one *nil habet*. 2 Rol. 458. l. 25.

So, if he has returned a distress, he cannot upon the *grand distress*, *alias* or *pluries*, say, nothing by which he may be distrained. 2 Rol. 458. l. 35.

If upon a *capias pro fine*, he returns *cepi*, and upon the *capias ad satisfaciend., non est inventus*. R. 1 Leo. 51.

So, he cannot make a return contrary to a return by his predecessor. 2 Rol. 458. l. F.

But a return, not repugnant to a former return, may be made, though it varies therefrom; as, he may say, evicted by an elder title *mesme* between this and the former writ, *et sic nihil habet*. 2 Rol. 458. l. 30.

Or,

Or, that he had the land *pur autre vie*, in right of his wife, &c. who is now dead. 2 Rol. 458. l. 93.

That he has nothing *præter* the issues *prius forisfact*. 2 Rol. 458. l. 40.

So, a return cannot be made contrary to a matter of record; as, if upon *plene administravit* it be found for the plaintiff, upon which execution goes *de bonis testatoris* to the sheriff of the same county, he cannot return *nulla bona*. 2 Leo. 67. R. cont. 3 Leo. 2. for he says, *nulla bona in balliva sua*, and therefore it is not repugnant.

But, after a verdict for the plaintiff upon *plene administravit*, the sheriff of the same county may return a *devastavit*. 2 Leo. 67.

So, upon a *constat* entered of goods in another county, and a *testatum* thereon, the sheriff may say *nulla bona*. 2 Leo. 67.

#### (E 5.) Must not falsify the writ.

So, the return ought not to falsify the writ; for that belongs to the defendant, and therefore in replevin he cannot say, no cattle taken; for this goes to the point of the writ. Sal. 581. Adm. cont. Kit. 263. a.

If there be judgment against A. G. widow, and a *ca. sa.* thereon, and before execution of the writ she marries B., the sheriff cannot return, that she is now the wife of B., for that falsifies the writ and record. R. 2 Cro. 323. 2 Bul. 81.

#### (E 6.) Bad return, how aided:— By appearance.

But an insufficient return by the sheriff will be aided by the appearance of the party; as, in a *scire facias* upon a fine or judgment, if the sheriff does not mention the summoners or viewers. Kit. 279. b.

In a *scire facias* against an heir and terre-tenants, if he says nothing as to the heir. Dub. Cro. Car. 295, 296.

So, if he does not mention the summoners upon the return of a *grand cape*. Kit. 279. b.

So, if the sheriff does not return issues upon a *distringas juratores*, it will be aided by the appearance of the jurors. Kit. 279. a.

#### (F) Remedy against the sheriff.

##### (F 1.) If he do not make a return.

If the sheriff does not return a writ delivered to him, when it ought to be returned, he shall be amerced *quousq.* 2 Inst. 452.

[In what time the sheriff must return a writ, and on whom the rule for a return must be served. Doug. 420.]

By the st. 1 Ed. 6. 10. 5 (or 5 & 6) Ed. 6. 26. & 31 El. 9. the sheriff, &c. forfeits 5*l.* if he does not return proclamation upon an exigent in Wales, or a county palatine.

And by the st. 7 Ed. 6. 1. if he does not return a writ concerning issues, or a debt, to the king, the sheriff may be fined or amerced by any court of revenue.

So, in a real action, after summons, if the sheriff does not return the writ,

writ, an action upon the case lies against him. Adm. Cro. El. 175. 1 Leo. 146. 1 Rol. 93. l. 20.

So, by the st. W. 2. 13 Ed. 1. 39. if any fear the malice of a sheriff, that he will not return a writ, he may deliver his writ in full county, and take a bill from the sheriff or under-sheriff, mentioning the names of the demandant and tenant, and day of delivery of the writ, to which the sheriff or under-sheriff, on request, shall put his seal, or, if he will not, some present may put their seals, &c. And if the sheriff return not the writ, &c. the demandant or plaintiff shall have his damages, with respect to the nature of the action, and the danger by the delay.

And, by the st. 2 Ed. 3. 5. the sheriff is obliged to take the writ, and sign such bill. 2 Inst. 451.

And, in such special case an action upon the case lies against the sheriff, if he does not return the writ. 2 Inst. 452.

So, a demandant or plaintiff, to take the benefit of the statute, may deliver the writ to the sheriff, upon record, in court. Ibid.

So, an action upon the case lies for not returning a *capias utlagatum* upon *mesne* process. Cl. Ass. 262.

Or, an *exigent*.

So, all *mesne* process ought to be returned; for otherwise the arrest thereon will be wrongful, and false imprisonment will lie against the sheriff. R. 5 Co. 90. 2 Rol. 563. l. 20.

Yet, false imprisonment does not lie against the party himself, a bailiff, or him who acts in aid of the arrest, if the writ be not returned, because the return is not in their power. Cont. 2 Rol. 563. l. 30. 40. R. acc. 2 Rol. 562. l. 35. 45. 50.

So, if an *elegit* be not returned, the execution will be void; for it is not an act of the sheriff alone; but there ought to be an inquisition taken. R. 4 Co. 67. a. R. 5 Co. 90. a.

So, if an officer of an inferior court does not return process directed to him, false imprisonment lies against him. R. 2 Rol. 563. l. 10.

So, a *certiorari* lies to the sheriff, to return an outlawry or *disseisin*.

But where final process issues, upon which no judgment or other process is to be had, no return is necessary; as, upon a *feri facias* which levied the whole debt. R. 5 Co. 90. Cro. El. 209. 238. Mo. 468. R. 1 Sal. 318. R. 4 Leo. 194.

Or, a *capias ad satisfaciendum*. R. 4 Co. 67. a. 5 Co. 90.

Or, a *liberate* after an *elegit*. R. 4 Co. 67. a. R. 5 Co. 90. Semb. 1 Leo. 280.

Or, an *habere facias seisinam*, or *possessionem*. R. 4 Co. 67. a. 5 Co. 90.

[Sheriff shall be obliged to return *ca. sa.* though he shews by affidavit that he had taken defendant, and discharged him, on a letter from a peer that he was his menial servant. B. R. H. 348.]

[If defendant is protected, and protection registered, the court will discharge a treasury rule for return. Barnes, 417.]

[If sheriff returns defendant protected, the court will not make rule for better return; if insufficient, plaintiff may apply next term for attachment. Barnes, 425.]

Yet, if the sheriff does not return a judicial process, he may be amerced

amerced for his contempt; for the writ says, *ita quod habeas, &c.* R. 5 Co. 90. b.

So, if full execution be not done upon a prior writ, a subsequent execution cannot be taken, till the former is returned; as, if only part be levied upon a *feri facias*. R. 1 Sal. 318.

So, regularly, an action upon the case does not lie against the sheriff for not returning a writ, without other default; for he shall be amerced. Semb. 2 Inst. 452.

[By st. 20. G. 2. c. 37. the sheriff is not liable to be called upon to make a return, unless required so to do in six months after the expiration of his office.]

[By the true construction of the statute, the months are to be lunar ones, and the day on which the sheriff goes out of office is to be reckoned part of the six months. Dougl. 463.]

[A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired. 2 T. R. 1.]

[Where a sheriff has been guilty of a contempt in the course of a civil suit, and then the defendant dies, an attachment may issue against the sheriff afterwards for the prior contempt. 3 T. R. 133.]

[If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. 4 T. R. 119. 2 Bl. 952.]

[Plaintiff's attorney, having blank-warrants, does not carry writ to under-sheriff till a year after the return, the court will not make rule for return. Barnes, 423.]

[If sheriff directs warrant to bailiff of plaintiff's nomination, and has indemnity indorsed on the writ; yet, plaintiff may call for return. Barnes, 411.]

[If the warrant is directed to officers of plaintiff's nomination, not to the officers of bailiff of a franchise, no rule to return sheriff's mandate. Barnes, 416.]

[If under-sheriff absconds, court will make rule, that leaving copy of rule to make return at his house, shall be good. Barnes, 35.]

[If defendant has continued in custody since arrest, rule to bring in body shall be discharged, otherwise, if escape. Barnes, 32. 381.]

[Delivery of original rule to bring in body to under-sheriff, is good service on high-sheriff. Barnes, 405.]

[By rule in B. R. T. 31 G. 3. it is ordered, that where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall be afterwards returned, he shall and may within the time allowed by law be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted. 4 Term Rep. 379.]

[By rule in B. R. M. 32 G. 3. it is ordered, that in future all writs should be returned by the sheriff on the day on which the rule for returning the same should expire, and in default thereof that the plaintiff should be at liberty to move for an attachment on the next day. 4 T. R. 496.]

[A sheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ; and if he be, and be attached

attached for not obeying it, the court will set aside the attachment for irregularity. 5 T. R. 479.]

(F 2.) If he makes a false return.

So, for a false return the sheriff may be amerced, according to an ordinance against sheriffs. Rast. 372. a. By the st. 28 Ed. 1. 16.

So, if a sheriff alters the return of a bailiff of a franchise, he shall answer to the king, and to the bailiff, for the damage to him. 2 Rol. 563. l. 25.

So, for a false return, an action upon the case lies against a sheriff by the common law. 2 Inst. 452. R. 4 Mod. 404. R. Mo. 349.

[If the return be false in substance, though true in words, an action will lie. Dougl. 159.]

So, false imprisonment; for it makes him a trespasser *ab initio*. 2 Rol. 563. l. 15.

So, if a bailiff of a franchise makes a false answer to the sheriff, an action upon the case lies against him. R. 1 Rol. 98. l. 37. 99. l. 30.

So, if a sheriff returns a false answer of a former bailiff, who was not a minister at the time of the return, an action upon the case lies against the sheriff. R. 1 Rol. 99. l. 35.

[The court will not try the truth of a return, on a motion to set aside proceedings; but the party will have his action. Str. 813.]

[Fifty pounds damages are not excessive on an action for a false return of a rescue, whereon plaintiff had been imprisoned. Barnes, 229.]

But an inferior officer shall not be prejudiced by a false return of the sheriff; as, if a bailiff, &c. by warrant of the sheriff, levies a debt upon a *feri facias*, and delivers it to the sheriff, who returns *tarde*, &c. an action does not lie for the money against the bailiff. R. 1 Leo. 144. Cro. El. 181.

So, if a sheriff returns a false answer made by a bailiff of a franchise, the sheriff shall not be amerced, nor shall there be an action upon the case against him, but against the bailiff. 2 Rol. 461. l. 35. R. 1. Rol. 98. l. 37. 99. l. 30.

So, if a sheriff returns the answer of a bailiff, *cepi corpus*, and the bailiff has not the body, an attachment goes against him. Ray. 193.

So, an action does not lie against a sheriff for a return in course, though it be false; as, if he returns *elongata* upon a replevin, when he cannot make deliverance; for he has no other return, except that none showed him the cattle. Sal. 581.

[Possession is *prima facie* evidence of property in goods; as in an action against the sheriff for a false return of *nulla bona* to a *fi. fa.* 2 T. R. 609.]

[Return, *non est inventus*, with the name of the sheriffs of the last year, is a false return by the sheriffs of the present. Lofft. 83.]

(F 3.) Or, an insufficient return.

So, the sheriff shall be amerced for an insufficient return.

So, if the sheriff returns an insufficient answer of the bailiff of a franchise; for he may say, *nullum dedit responsum*. R. 2 Rol. 460. l. 50.

As, that the bailiff returned *tarde*; for it is the fault of the sheriff that he had not the writ before. 2 Rol. 461. l. 20.

So, if he returns the answer of a former bailiff, after a new one chosen. R. 2 Rol. 461. l. 10. Cro. El. 512.

If, by his return, he says he did that which the bailiff ought to do. 2 Rol. 461. l. 30.

But an action upon the case does not lie for an insufficient return. Semb. Cro. El. 512.

### (G) Averment against a return.

So, the return of a sheriff is of such high regard, that generally no averment shall be admitted against it; as, if A. be returned to be outlawed, he cannot say that he was only *quarto* or *quinto exactus*. Kit. 280.

If a sheriff returns issues upon B., it cannot be averred by A., to save the issues, that his name is not B. 2 Rol. 462. l. 5.

If a sheriff, in *redisseisin*, returns, *accessi ad terras*, &c. it cannot be assigned for error, *quod non accessit*. 1 Leo. 183.

If coroners make a return, it cannot be said that only one made the return. R. Ray. 485.

If a sheriff returns, *scire feci A. tenen. un. mes.*, A. cannot plead *non tenet*. R. Cro. El. 872. R. 2 Mod. 10.

But, where his life or inheritance is in jeopardy, an averment shall be allowed against the return; as, if A. be outlawed for felony, he may say that he tendered surety before the fifth county. 2 Rol. 462. l. 15.

So, if a summons be returned in a *præcipe quod reddat*, the tenant may say that he was summoned by another name, for otherwise he will lose by default. 2 Rol. 462. l. 10.

So, if a return be by an improper officer; as, if upon a certificate obtained by the attorney-general, to certify whether A. be outlawed, the coroners return that he is outlawed, A. may say, *non ullagat.*, for the sheriff was the proper officer to certify the outlawry, though it be pronounced by the coroners. R. Dy. 223. a.

So, by the st. W. 2. 39. if the sheriff returns none, or too small issues, it may be averred that he had greater issues; upon which there shall be a writ of inquiry to the judge of assise.

[The return of the sheriff is conclusive against him, since thereby he recognizes the act done as his own; therefore he is liable to treble damages at the suit of the party grieved, under stat. 29 Eliz. c. 4. if it appear by his return that greater fees have been taken in executing a writ than are allowed by that statute. 2 T. R. 148.]

[No averment can be taken in pleading against the sheriff's return. 15 East, 378.; if false, the remedy is by action. Loft. 371.]

### Bad return.

Vide ABATEMENT, (H 15.)

### False return.

Vide PARLIAMENT, (D 15.)

Vide

Vide more concerning Return, in Amendment, (G 1, 2.) — Certiorari (C): — Execution, (C 7.) — Habeas Corpus, (E 1, &c. — I.) — Mandamus, (D 1, &c.) — Parliament, (D 13.) — Pleader, (B 5.) — Process (B). — Rescous, (D 4, &c.)

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RETRAXIT.

Vide PLEADER, (X 2.)

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REVENUE.

[(A) Exportation.]

[Goods shipped as for exportation, but with the intention of re-landing contrary to law, are liable to seizure, though on board. 1 B. & P. 267.]

[(B) Judicial proceedings.]

[The regulations for preserving the revenue are properly cognizable in the exchequer, and any action relating to them may be removed into the exchequer. 1 Aust. 220.]

[The removal of actions in which the revenue is concerned, operates by way of injunction. 1 Aust. 205.]

[(C) Officers.]

[The officers of revenue have not any privilege of being sued in the court of exchequer. 1 Aust. 217.]

[Money had and received will not lie against a revenue officer, for an over-payment which he has paid over. Cowp. 69.]

[An action of trespass against revenue officers for their conduct in the execution of their office, may be removed from the other courts of law into the exchequer office of pleas. 1 Aust. 205.]

[The exchequer will remove into its own court proceedings commenced against all revenue officers in the courts of great sessions in Wales, for acts done in execution of his duty. 1 Price, 206.]

[The executor of a deputy quarter-master-general, is compellable to account before the commissioners for auditing public accounts, though no *insuper* was set, nor was the testator put in charge during his life; and though the account in which the *insuper* appeared was not declared till seven years after his decease. Wightw. 369.]

[The party is killed within the meaning of the stat. 19 Geo. 2. c. 34. s. 6. in that place in which the shot was fired, or other act done which produced the death. 12 East, 224.]

[(D) Government agents.]

[Where a person receives commission money as an agent, he shall not be allowed to charge government any more than the sum actually paid for the article furnished. Wightw. 10.]

Vide Parliament, (H 20.) — Prærogative, (D 39, &c. 87, &c.)

**REVERSION.**

Vide **COPYHOLD**, (C 12.)—**DEVISE**, (N 19.)—**ESTATES**, (B 10, 11, 12. 31.)—**OFFICER**, (B 13, 14.)

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**REVERSIONER.**

Vide **RECEIPT**, (A 2. — B 2.)—**RECOVERY**, (B 7.)

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**REVERTER.**

Vide **PLEADER**, (3 E 3.)

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**REVIEW.**

*Bill of review.*

Vide **CHANCERY**, (G.)

*Commission for review.*

Vide **PRÆROGATIVE**, (D 16.)

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**REVIVOR.**

*Bill of revivor.*

Vide **CHANCERY**, (F.)

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**RE-UNION.**

Vide **FRANCHISES**, (G 1.)

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**REVOCATION.**

Vide **ARBITRAMENT**, (D 5.)—**CHANCERY**, (4 O 1, &c.)—**COPYHOLD**, (F 12, 13.)—**DEVISE**, (F 1, 2.)—**ESGLISE**, (H 10.)—**POIAR**, (A 1.)—**USES**, (L 2, &c.)

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**REVOUCHER.**

Vide **VOUCHER** (C.)

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**[REWARD.]**

[One who receives a reward, offered for a discovery which he was enabled to make, in consequence of another having communicated to him her suspicions, as she stated, for his own benefit, is not liable to her for any part of it. 1 M. & S. 108.]

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**RIGHT.**

## RIGHT.

Vide DROIT. — GARRANTY (F — G). — GRANT (D). — PLEADER, (E 22.) — RELEASE, (B 1, &c. — E 2.) — REMITTER, (A 1, &c. — C 2, 3, 4.)

### Right of advowson.

Vide Dismes, (M 10.) — QUARE IMPEDIT, (B 1.)

### Bare right.

Vide ASSIGNMENT, (C 2.)

### Right close.

Vide DROIT, (C 1, &c.)

### Common right.

Vide COPYHOLD, (S 16.) — DISMES, (K 1. 14.)

### Right upon a disclaimer.

Vide DROIT, (F).

### Right of dower.

Vide DOWER, (G 1.)

### Right of patent.

Vide DROIT, (B 1, &c. — D).

### Prescriptive right.

Vide COPYHOLD, (S 17.)

### Right of ward.

Vide GUARDIAN, (H 1.)

### Writ of right.

Vide BATTELL, (A 2.) — DROIT, (B 1, &c. — E, &c.)

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## RIOT.

Vide FORCIBLE ENTRY, (D 8, &c.) — JUSTICES OF PEACE, (B 9.)

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## [RIVER.]

[On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river. 1 Mars. 313. 5 Taunt. 704.]

[The right to the soil of a navigable river belongs, by presumption of law, to the king, not to the owners of the adjoining land. Dougl. 441.]

[The public have no right, without a special custom, to tow upon the banks of ancient navigable rivers. 3 T. R. 253.]

[A navigable river in the king's highway, for the use of himself and his subjects. Loft. 556.]

[Semble, that the right to the use of the water of rivers as an easement to lands contiguous to rivers, is a right of occupancy. The first settler may use as much as he please; but, having taken a certain quantity by a channel of a certain dimension, and another person having settled lower down the stream, and taken the use of the water subject to the then definite use of the water by the first settler, the latter is entitled to enjoy as much as he can so occupy in a similarly definite manner, and though the prior settler might have previously used all the water, he cannot then abridge the use of the second settler and occupant. 2 Smith, 321. 6 East, 208.]

[A right to drown a neighbour's lands, during arbitrary periods, is not restricted to the measure of the accustomed exercise thereof. 5 Taunt. 454.]

[Case against a corporation for not repairing a creek in which the tide of the sea ebbed and flowed (but not saying that the creek was a navigable river) as from time immemorial, they had been used, is well enough, without laying the obligation to be *ratione tenuræ*, or for other special cause, and without laying special damage. Cowp. 86.]

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## ROBBERY.

Vide APPEAL, (A 2.) — JUSTICES, (O 1, &c. — Y 8.) — PLEADER, (2 S 4.)

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## [ROCHESTER.]

[The attorney-general cannot himself issue a *certiorari* to remove the record of an indictment for murder, found at the sessions for the city of Rochester; but, upon his application to the court of K. B., the court grant it as of course, with an *habeas corpus* to bring up the prisoner. 4 M. & S. 442.]

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## ROGUES.

Vide JUSTICES, (S 9.) — JUSTICES OF PEACE, (B 76, &c.)

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## ROLLS.

Master of the rolls.

Vide CHANCERY, (B 4.)

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## ROUT.

Vide FORCEABLE ENTRY, (D 8, &c.)

ROY,

## ROY

(A) The king of England ; who shall be.

(A 1.) By descent. *infra*.

(A 2.) By what rules the descent shall be governed.  
p. 296.

(A 3.) By act of parliament. p. 296.

(B) Style of the king, p. 297.

(C) Coronation. p. 298.

(D) Dignity of the king. p. 298.

(E 1.) Council of the king.

(E 2.) Privy council ; — President of the council.  
p. 299.

(E 3.) The residue of the council. p. 299.

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(F) The queen.

(F 1.) The privileges of a queen consort. p. 300.

(F 2.) *Aurum reginae*. p. 301.

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(G a.) Issue of the king, the prince. p. 301.

[(G b.) Marriage of the royal family.] p. 303.

(H) *Custos regni*.

(H 1.) The authority of the *custos*. p. 303.

(A) The king of England ; who shall be.

(A 1.) By descent.

The king of England holds his kingdom by descent, upon which his succession is attendant. 7 Co. 10. b. Calvin.

And therefore if a king, having a defeasible estate, dies seised, the descent tolls the entry of him who has the right, which could not be, if the title of the successor was by succession, and not by descent. 7 Co. 11. a. Calvin.

And the king's title is complete by descent, before his coronation, which is but a ceremony. 7 Co. 10. b. Calvin.

And therefore high treason may be committed before, as well as after it. R. 7 Co. 11. a. Calvin.

So, he begins his reign upon the day on which his ancestor died. R. per all the J. 1 And. 44. Bend. 79.

(A 2.) By what rules the descent shall be governed.

The descent of the crown varies from the general rules of descent as to a subject; and therefore, if the king dies without issue male, having several daughters, the descent of the crown, and lands of the king, shall be to his eldest daughter only. Co. L. 15. b.

So, if he dies without issue, or brother, having several sisters, it shall be to the eldest. Ibid.

If he has a son and a daughter by one *venter*, and a son by another, and the eldest son enters, and dies, the other son shall have it, and not the daughter of the whole blood; for *possessio fratris*, or half blood, does not take place. Ibid.

If a king, by descent on the part of his mother, purchases land to him and his heirs, it shall descend with the crown to the heir of the part of the mother, and not to the heir of the part of his father. Ibid.

[The rule that the half-blood shall not inherit, does not affect the succession to the crown. Lofft. 398.]

(A 3.) By act of parliament.

So, the descent or succession of the crown may be limited by act of parliament. Vide Parliament, (H 18, 19.)

So, by the st. 4 & 5 An. 8. & 6 An. 7. if any shall maliciously, advisedly, and directly, by writing or printing, maintain that the king and parliament of this realm cannot make laws to bind the crown of this realm, and the descent, limitation, inheritance, and government thereof, he shall be guilty of high treason.

And if, by preaching, teaching, or advised speaking, he so maintain, he shall incur a *præmunire*.

So, qualifications may be required of him who shall be admitted to the possession of the crown, for want of which he shall be excluded.

By the st. 1 W. & M. 2 Parl. 2. every person, who shall be reconciled to, or hold communion with the church of Rome, or profess the popish religion, or marry a papist, shall be excluded, and for ever incapable to inherit or enjoy the crown, &c. And in such case, the people are hereby absolved from their allegiance, and the crown shall be enjoyed by such, being protestants, as should have enjoyed the same if the person so reconciled, &c. were naturally dead.

And every king, on the first day of his first parliament, or at his coronation, which shall first happen, shall repeat and subscribe the declaration against popery in the st. 30 Car. 2.

So, by the st. 12 & 13 W. 3. 2. every one who succeeds to the crown by the limitation of the same statute.

And by the same statute, every one who shall hereafter come to the possession of the crown, shall join in communion with the church of England, and not go out of his realms (repealed by 1 Geo. 1. stat. 2. ch. 51.) without consent in parliament.

So, the king cannot subject his kingdom to the pope, or any other, or to the payment of a yearly tribute to him, without the assent of the lords

lords and commons. 3 Ed. 1. 2 Rol. 163. l. 35. R. in Parl. 40 Ed. 3. 4 Inst. 13.

(B) The style of the king.

The style of the king is not parcel of his name.

Yet, upon the omission of an usual part of the style, a writ shall be quashed; as, an omission of *Scotiæ*, &c. 2 Lev. 223.

William the Conqueror was styled Will. *Rex*, or W. *Rex Anglorum*, Co. L. 7. a.

W. Rufus, W. *Rex*, or *Rex Anglorum*, or *Dei Gratia Rex Anglorum*, Co. L. 7. a.

Hen. 1. and Stephen, Hen. or Steph. *Rex Anglorum*, or *Dei Gratia Rex Anglorum*. Ibid.

Maud, Matildis, Imperatrix, H. Regis Filia, et Anglorum Domina. Ibid.

Hen. 2. H. *Rex Angliæ*, *Dux Norman. et Aquitaniæ*, et Comes *Andergoviæ*. Ibid.

So, Ric. 1. and K. John; but the last added *Dominus Hiberniæ*. Co. L. 7. b.

Hen. 3. had his style as K. John, till the 44th year of his reign, when he was styled only *Rex Angliæ*, *Dominus Hiberniæ*, and *Dux Aquitaniæ*. Ibid.

So, Ed. 1, 2, and 3. till the 13th year of his reign, when he was styled Edw. *Dei Gratia Rex Angliæ et Franciæ*, et *Dominus Hiberniæ*. Ibid.

So, R. 2. Hen. 4. and Hen. 5. till the 8th year of his reign, when he was styled *Henricus Rex Angliæ*, *Hæres et Regens Franciæ*, et *Dominus Hiberniæ*. Ibid.

Hen. 6. was styled H. *Dei Gratia Rex Angliæ et Franciæ*, et *Dominus Hiberniæ*. Ibid.

After his restoration he added, *ab Inchoatione Regni sui* 49, et *Recapitation. Regiæ Potestatis* 1. Ibid.

So, Edw. 4. Ric. 3. and Hen. 7. were styled as Hen. 6. before his deposition. Co. L. 3. b.

And Sovereign Lord, Liege Lord, Highness, or Kingly Highness, were appellations used to the king before the time of Hen. 4. to whom Grace was attributed, Excellent Grace to Hen. 6., Majesty to Hen. 8. Co. L. 7. a.

Hen. 8. was styled H. *Dei Gra. Rex. Angl. et Fran. et Dominus Hibern.* in the beginning of his reign. Co. L. 7. b.

In the 10th year of his reign, he added *Octavus*, Hen. *Octavus Dei Gra.*, &c. Ibid.

In the 13th year, he added, *Fidei Defensor*. Ibid.

In the 22d year, *Supremum Caput Ecclesiæ Anglicaniæ*. Ibid.

In the 23d year he was styled, H. 8. *Dei Gr. Ang. Franc. et Hib. Rex, Fidei Defensor, et in Terrâ Ecclesiæ Anglicaniæ et Hibern. Supremum Caput*. Co. L. 7. b., and this by the st. 35 H. 8. 3. 4 Inst. 344.

So, Ed. 6. and Mary, in the beginning of her reign; but she soon omitted *Supremum Caput*. Co. L. 7. b.

After her marriage with Philip, the style was Phil. & Mary, *Dei Gra. Rex et Reg. Angliæ, Franciæ, Neapolis. Hierosol., et Hibern., Fidei Defensor. Princip. Hispan. et Scicil., Archd. Austriæ Duces, &c.*

Q. Eliz.

Q. Eliz. was styled Eliz. *Dei Gratia Angliæ, Franciæ, et Hiberniæ Regina Fidei Defensor.*

So, Jam. 1., Cha. 1. & 2., Jam. 2. &c. each was styled, *Dei Gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ Rex, Fidei Defensor.*

### (C) Coronation.

Coronation is the usual ceremony for the inauguration of the king.

William the Conqueror, and his successors, were all *coronati insigniti*.  
Brad. 190. 217. 233. 298. 421. 462. 522.

At the time of the coronation, the consent of the people was usually asked. Bra. 190.

So, an oath was usually required of the king, to do justice, maintain the peace, the laws and liberties of the church and kingdom. Bra. 190. 217. 234. 421. 522. Bract. 1. b. Stamf. P. C. 99. a.

And sometimes, by his oath, he was bound to do some particular things; as, Stephen. Bra. 272.

By the st. 1 W. & M. 6. every king and queen of this realm, at the coronation, shall swear to govern according to the statutes, laws, and customs of the realm; to cause law, and justice in mercy, to be executed; to maintain the laws of God, the protestant religion established by law, the rights and privileges of the clergy.

And by the st. 12 & 13 W. 3. 2. every king and queen, who succeeds to the crown by virtue of the said act, shall have the coronation-oath administered to him at his coronation, pursuant to the said act.

But the king is complete before his coronation. Vide antè, (A 1.)

### (D) Dignity of the king.

The king of England has two capacities, natural and politic. 7 Co. 10. a. Calvin. Pl. Com. 213.

In respect of his politic capacity, the king never dies. 7 Co. 10. b. Calvin.

So, the king never has disability by infancy or nonage. 7 Co. 12. a. Calvin. R. Pl. Com. 213.

So, if the king be attainted for high treason; when the crown descends or comes to him, the attainder is discharged, and he is able *ipso facto*, when he takes upon him to be king. R. 1 H. 7. 4. b.

So, the king cannot be seised to the use of, or in trust for another. Lane, 54.

And therefore, if a trustee be attainted for treason, the king shall have his moiety or share to himself discharged from the trust. R. Lane, 54.

So, the king is supreme within his realm. Vide Prærogative, (D 17.)

The crown of England is an imperial crown. Dav. 61. a. by the st. 24 H. 8. 12.

By the st. 16 R. 2. 5. it was declared that the crown of England hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to God touching the regality of the same crown, and to no other.

So, the dignity of the king continues, though he be in a foreign realm. 7 Co. 15. b. Calvin.

A felony or other offence in the king's palace, if he be at Paris, &c. shall be punished by the marshal of the Marshalsea. 7 Co. 15. b.

So,

So, if a foreign king be in England, he shall be allowed the title and privilege of a king; for *suprema et infima dignitas est universalis*. 7 Co. 15. b.

And therefore he ought to sue, and shall be sued by the name of king; otherwise the writ abates. Ibid.

But a foreign king shall be subject to the laws here.

### (E 1.) Council of the king.

The king has several councils. Co. L. 110. a.

#### (E 2.) Privy council.

For matters of state the king has his privy council. Co. L. 110. a.

##### (E 2. a.) President of the council.

By letters patent one has been constituted, from ancient times, president of the council *durante beneplacito*. 4 Inst. 55.

In the time of king John there was a president of the council. 4 Inst. 55.

And there was in several subsequent reigns, except in the time of queen Elizabeth. 4 Inst. 55.

By the st. 21 H. 8. 20. the president of the council shall be associate in all acts appointed by the statute to be done by the chancellor, treasurer, or privy seal; as, naming sheriffs, setting prices of wines, &c.

He ought to attend the king's person, to represent to him the affairs of the council. 4 Inst. 55.

##### (E 3.) The residue of the council.

The residue of the council consists of such a number as the king pleases. 4 Inst. 53.

And by the custom of the realm, upon summons to the council, and taking the oath of a privy counsellor, each of them continues of the council during the king's life without letters patent or other grant. 4 Inst. 54.

##### (E 4.) The duty of a privy counsellor.

A privy counsellor by his oath is required, as far as discretion suffers, truly to counsel the king, in all matters treated in the council, or by him as the king's counsellor. 3 Rush. 967.

And in all things that may be for the king's honour and behoof, and to the good of his realm and subjects, without partiality, not leaving so to do for love, meed, doubt, or dread of any.

To keep secret the king's council, and all communed in council, without publishing it by word, writing, or otherwise, to any out of the council, or to any of the same council, if it touch him.

Nor, for gift, meed, or promise, to promote, favour, or hinder any matter treated or done in council.

To help with all his might the same council in all that shall be thought by it for the universal good of the king and his land, and the peace of the same.

To withstand any, of what degree soever, that shall attempt or intend the contrary.

And generally to do all a good and true counsellor ought to do to his sovereign. 4 Inst. 54.

They

They ought to consult of, and for the public good, the honour, safety, and profit of the realm. 4 Inst. 53.

Each of them ought to be expert, provident for the king, *parcus sui nec avidus alieni*. 4 Inst. 53.

[Offering money to a privy counsellor, to procure the reversion of an office in the colonies, of the gift of the crown, is a misdemeanor at common law, punishable by information, even though it is a saleable office. 4 B. M. 2494.]

By the st. 12 & 13 W. 3. 2. after the limitation settled by this act takes effect, all resolutions taken in council shall be signed by such of the council as shall advise and consent to the same.

And all matters relating to the well-governing of this kingdom, properly cognizable in the privy council by the laws and customs of this realm, shall be transacted there. But by the st. 4 & 5 An. 8. these clauses are repealed.

#### (E 5.) The power.

The privy council may commit a criminal, as an incident. Skin. 597. So, any of the privy council. Semb. 5 Mod. 81. Skin. 599.

So, a secretary of state. Skin. 598.

And the commitment may be to a messenger till examination, or for a little time, till a removal to gaol. Skin. 599.

[Before 3 Car. 1. all privy counsellors exercised the power to commit; they then disused it, but still prescribed to commit *per mandatum regis*; but that first power was not warranted; they ought only to commit in council, not out of it. The *mandatum regis* is only his mandate in council. 2 Wils. 275.]

But by the st. 16 Car. 1. 10. the king or privy council have not jurisdiction, &c. by bill, petition, &c. to draw into question, determine, or dispose of the lands, tenements, goods, or chattels of any subject.

So, the privy council cannot lay an imposition, tallage, or charge upon the subject in any manner. 2 Rol. 174. l. 10. Vide Parliament, (H 9, &c.)

[The king in council cannot decree *in personam* in England, (except in some criminal matters,) therefore cannot decree an agreement that is disputed. 1 Vesey, 444.]

[The law committee of the privy council cannot send a case to a court of law for their opinion. Dougl. 344.]

#### (F) The queen.

##### (F 1.) The privileges of a queen-consort.

The queen, consort of the king, is a person exempt by the common law, and has capacity to sue and be sued alone without the king. Co. L. 133. a. Vide Action; (B 2.)

So, she has capacity to take lands and tenements by grant to her from the king himself. Co. L. 133. a. 2 Rol. 213. l. 20.

So, she may make grants, and take estates by herself, without the king. Co. L. 133. a. 2 Rol. 213. l. 30. 4 Co. 23. b.

She may give a bond or other specialty. 2 Rol. 213. l. 25.

So, the queen has privilege, that she shall not be amerced. Co. L. 133. a.

Nor,

Nor, find pledges. Co. L. 133. a.

Nor, pay toll. Co. L. 133. b.

So, the queen has the disposition of her servants, exclusive of the king.

And therefore, if the king grants to another to be saddler to the queen, it will be void; for he ought to be a servant to the queen by her own grant. Dub. 2 Rol. 213. l. 42.

So, sometimes the king grants that she shall have the same remedy as the king for the recovery of her debts. Mad. 247.

(F 2.) *Aurum reginæ.*

So, by the common law, there is a duty to the queen consort, *procentem marcis, una marca, de iis, qui sponte se obligant* to the king. 12 Co. 21.

It is called the tenth part. Blo. Nom. Verb. Queen Gold.

And therefore, if a subject *sponte se obligat* to pay money to the king for licence to alien, or purchase in *mortmain*, this duty accrues to the queen. R. 12 Co. 22.

Or, for the grant of a fair, market, or other franchise, or liberty granted by the king *de novo*. 12 Co. 22.

Or, for the restitution of liberties. Mad. 240, 241.

But it is not due upon a fine to the king by judgment, or for an alienation, or otherwise for money paid to the king by compulsion. R. 12 Co. 21.

Nor, for money paid to the king in consideration of a lease, or grant of possessions, or any revenue of the king. R. 12 Co. 21.

Nor, for money paid for the grant of a fair, market, waifs, &c. or other franchise *in esse*. 12 Co. 22.

Nor, for money given by a subject to the king, *ex gratia*: for he is not bound to this. R. 12. Co. 21.

(F 3.) Queen-dowager.

The hospital of St. Catherine was founded by Eleanor dowager of K. H. 3. with reservation of the patronage *sibi et reginis succedentibus*; wherefore the queen dowager shall always have the nomination of a master, when there is not a queen consort *in esse*. R. Ca. Ch. 215. Skin. 15.

So, though there be a queen consort. Per Hale, Ca. Ch. 215.

So, if a queen consort grants, it is not determined when she becomes dowager. R. Skin. 15.

(G a.) Issue of the king, the prince.

The eldest son and heir apparent of the king is called the prince, *quasi primus post regem*. Dod. Noby. 9.

King Ed. 3. by his charter 18 Mart. 7 Ed. 3. at Pontefract, created his son Edward the Black Prince (then but three years of age) *Comitem com. palat. Cestrie habend. sibi et hæredibus suis, regibus Angliæ*. 4 Inst. 244.

By charter 17 Mart. 11 Ed. 3. he created him duke of Cornwall, *habend. eidem duci, et ipsius, et hæredum suorum, regum Angliæ, filiis primogenitis, et dicti loci ducibus in regno Angliæ hæreditarie successuris*. Which charter was established by authority of parliament. R. 8 Co. The Prince's case, 16.

By

By charter established by authority of parliament 17 Ed. 3. he created him *Principem Walliæ, habend. sibi et hæredibus suis, regibus Angliæ, imperpetuum*, and invested him by a chaplet of gold, a gold ring, and a silver wand *juxta morem*, but now a golden wand is used. 4 Inst. 243.

And, therefore, every first-born son of such a king, as is heir to the Black Prince, immediately upon the advancement of his father to the crown, shall be duke of Cornwall in the life of his father, (to whom he is heir apparent,) without other creation. R. 8 Co. The Prince's case, 16. b. 29. b.

And shall have a fee-simple in such dukedom, and the possessions of the duchy, though it does not descend according to the rules of the common law. R. 8 Co. The Prince's case, 27.

And his wife shall be endowed. 8 Co. The Prince's case, 7.

So, if the prince be created *Princeps Walliæ* or *Comes Cestriæ*, he has a fee-simple, though it be limited to him and his heirs, kings of England.

But the prince shall not be Prince of Wales, or Earl of Chester, till creation; for, upon his death, or advancement to the crown, these dignities are merged and extinct in the crown. 4 Inst. 243. 1 Bul. 133.

And the patent of creation shall be inrolled in B. R. 1 Bul. 133.

So, if the first-born son of the king dies in the life of his father, his first-born son shall not be Duke of Cornwall without a special creation, though he be heir apparent to the crown; for he is not the first-born son of a king of England. R. 8 Co. 29, 30. The Prince's case.

So, the first-born daughter of the king shall not be Duchess of Cornwall, though she be heir presumptive to the crown; for it must be a son. R. 8 Co. 30. a. The Prince's case.

So, if the king's eldest son dies, his second son, though he be heir apparent, shall not be Duke of Cornwall, without a special creation; for he was not the first-born son. 8 Co. 30. a. The Prince's case.

The Prince shall be immediately seised of the duchy of Cornwall, and all possessions belonging thereto.

But till a prince is born, the king is seised of all the possessions.

So, if there be not a queen consort, or dowager, the king shall be seised of all their possessions. R. Ca. Ch. 215.

So, the king may present to an advowson, and his clerk continues after a prince is born. Ca. Ch. 215.

So, if he nominates the master of an hospital, &c. R. Ca. Ch. 215.

Yet, a lease for years by the king, determines by the birth of a prince. Ca. Ch. 215.

The prince of Wales had many privileges allowed him by the law.

[Revival of information by his attorney-general at his death. Wightw. 134.]

The prince, as well as the king, has used to send letters to the exchequer, for favour, or excuse to his attendants. Mad. 626.

So, a grant by the king to the prince does not make an alienation from the crown; for the land continues parcel of the crown. Pal. 89.

### [(G b.) Marriage of the royal family.]

[Vide 12 G. 3. c. 11.]

If the king be absent out of the realm, he by his letters patent may  
con-

constitute one, or more, to be *custos regni* in his absence. 2 Inst. 26. 4 Inst. 6.

And he shall be called the *chief justicier*, or guardian of the realm. Mad. 21, 22.

(H *Custos regni.*

(H 1:) The authority of the *custos*.

The chief *justicier* presides in all cases criminal and civil, and in the exchequer. Mad. 21.

He holds pleas, lets the king's manors, &c. and makes allowances to accountants in the exchequer. Mad. 135.

Such *custos*, or guardian, is *quasi prorex*. 2 Inst. 26.

And may summon a parliament in the king's absence. 2 Inst. 26. Vide Parliament, (E 1.)

But there ought to be a special commission to him to hold, and proceed in parliament. 4 Inst. 6.

The writ of summons to parliament shall be tested by him. 4 Inst. 6.

All original writs shall be tested by him. 2 Inst. 26.

By the st. 8 H. 5. 1. a parliament held by writ of summons from the guardian of the realm, when the king is abroad, shall not be dissolved by arrival of the king.

*Assent of the king.*

Vide PARLIAMENT, (L 42.)

*King's Bench.*

Vide COURTS, (B 1, &c.)

*King's charter.*

Vide TRADE, (B—D 1.)

*King's grant.*

Vide GRANT, (G 1, &c.)—IRELAND, (D).

*King's justices.*

Vide JUSTICES, (K 8.)

*King's protection.*

Vide ABATEMENT, (F 11.)

*King's tenant.*

Vide ALIENATION, (A 1, 2.)

Vide more concerning the King, in Action, (B 1.—C 1.)—Administration, (B 3.)—Ancient Demesne, (C 1.)—Ann, Jour, & Wast.—Assignment (D).—Chase, (A 1, 2.)—Condition, (A 3.)—Copyhold, (S 12.)—Dett, (G 1, &c.)—Dismes, (C 3.—E 3. 7.)—Ecclesiastical Persons (A).—Eglise, (H 5, 6. 8.)—Execution, (B 1, &c.)—Hospital (B—C.)

## SACRAMENTS.

(B—C).—Idiot, (C—D 4.)—Justices, (K 1, &c.)—Money, (B 5, &c.)—  
 —Officer, (K 10.)—Pardon (A).—Parliament, D 1.—F 1, 2.—  
 G 10.—H 2. 4. 20. 24.—L 10. 34. 42.—R 8.)—Patent, (A—C 1,  
 &c.)—Prærogative per totum.—Præscription, (F 1.)—Tenure.—  
 Viscount, (C 5.—Visitor, (A 1.)—War, (B 1, &c.)

## ROYAL MINES AND FISHES.

Vide PRÆROGATIVE, (D 50.)

## SABBATH.

Vide TEMPS, (B 3.)

## SACRAMENTS.

- (A) The sacraments; how administered. *infra*.
- (B) Divine service. *infra*.
- (C) Who may administer. p. 305.
- (D) Remedy for not doing it. p. 305.
- (E) Penalty for neglect of the sacrament and of  
       divine service. p. 306.
- (F) Profanation. p. 307.

## (A) The sacraments; how administered.

By the st. 1 Ed. 6. 1. the blessed sacrament shall be ministered to the people in both kinds, except necessity otherwise require. Revived by the st. 1 El. 1. s. 14.

By the st. 1 El. 2. and 13 & 14 Car. 2. 4. all ministers, &c. shall administer both sacraments according to the order and form of the book of Common Prayer, &c.

And by the st. 1 El. 2. all laws, &c. whereby other administration of sacraments is established, shall be void.

By the st. 24 H. 8. 12. all prelates, pastors, &c. shall minister sacraments, &c. to all subjects of the realm, notwithstanding citation, inhibition, &c. from the see of Rome, &c., and he who by occasion of such inhibition, &c. refuses to administer them, shall have a year's imprisonment, and fine and ransom at the king's will.

## (B) Divine service.

By the st. 1 El. 2. and 13 & 14 Car. 2. 4. all ministers in cathedral, parish church, or other place of public worship, (except a congregation tolerated by the st. 1 W. & M. 8.) shall be bound to use morning, evening, and all other public prayer, in the order and form prescribed by the Book of Common Prayer, &c. And all laws, whereby other service or common prayer is established, shall be void.

And

And by the st. 13 & 14 Car. 2. 4. s. 17. no other form shall be used. By the st. 24 H. 8. 12. he who, by occasion of inhibition, citation, &c. from the see of Rome, &c. shall refuse to use divine service, &c. shall have a year's imprisonment, and fine and ransom at the king's will.

By the st. 1 El. 2. if any parson, vicar, &c. refuse to use the common prayer, or use other form, for the first offence he shall forfeit a year's profits of all his spiritual promotions, and six months imprisonment without bail; for the second offence shall be deprived and suffer a year's imprisonment; for the third offence shall be deprived and imprisoned for life.

But it is not sufficient to say, that he used *alias preces aut alio modo*, unless he used others in lieu of the common prayer. R. 3 Mod. 79.

### (C) Who may administer.

By the st. 13 & 14 Car. 2. 4. s. 14. no person, not having then episcopal ordination, shall administer the Lord's supper before he shall be ordained priest, according to the form prescribed by the book of common prayer, on pain of 100*l.*; a moiety to the king, of the other moiety, half to the poor, half to him that shall sue, &c.

### (D) Remedy for not doing it.

By the st. 1 Ed. 6. 1. the minister shall not, without lawful cause, deny the sacrament to any that desire it.

So; a parson cannot demand a fee for administering the sacraments; as, for a christening; for no fee can be due but by special custom. 1 Sal. 332.

Nor, can it be due by custom, where the christening is in another parish. Ibid.

Or, at another place or chapel, by another person in the same parish. R. 1 Sal. 332.

By the st. 2 & 3 Ed. 6. 1. (revived upon the repeal of the st. 1 Ma. 2. made by the st. 1 Jac. 25.) and by the st. 1 El. 2. applied by the st. 13 & 14 Car. 2. 4. to the form then introduced, if any minister refuse to use the common prayer, or use open prayer or sacraments in other form, or preach or speak in derogation of it, for the first offence being convicted at the next sessions by verdict, confession, or notoriety of the fact, he shall lose a year's profit of all his spiritual promotions, and be imprisoned six months without bail; and if he have no spiritual promotion, twelve months; for the second offence shall be deprived *ipso facto* of spiritual promotions, and suffer a year's imprisonment; or, having no spiritual promotions, during life; for the third offence shall be deprived and suffer imprisonment for life.

By the st. 13 & 14 Car. 2. 4. every minister, &c. in two months after promotion, shall read and declare assent to the common prayer, or be *ipso facto* deprived of all ecclesiastical promotions.

And every incumbent, who, having a curate, shall not read the common prayer publicly once a month, being convict on confession, or oath of two witnesses before two justices of peace, forfeits for every offence 5*l.*; on non-payment in ten days, to be levied by distress and sale to the use of the poor. Vide ante, (A—B).

**(E) Penalty for neglect of the sacrament and of divine service.**

By the st. 5 & 6 Ed. 6. 1. all persons shall resort (having no reasonable excuse) to the parish church, or usual place of divine service, on every Sunday and holiday, and there abide during common prayer, preaching, and other service, on pain of punishment by censures of the church.

By the st. 1 El. 2. he shall besides forfeit 12*d.* for every offence, to be levied by distress to the use of the poor; of which act justices of oyer and terminer and assize, and mayors, &c. of corporations have cognizance at the next sessions; and by the st. 23 El. 1. any justice of peace within a year and day after the offence.

By the st. 23 El. 1. he shall, over and above, forfeit 20*l.* for every month's absence; and on certificate in B. R. by the ordinary, or a justice of peace, of a twelvemonth's absence, shall be bound to good behaviour with two sureties in 200*l.* till conformity. A third part of the penalty goes to the queen, a third to the poor, and a third to the informer; but on submission at the sessions at the trial for the first offence, he shall be discharged. But by the st. 29 El. 6. the conviction shall be only in B. R. or at the assizes; and by the st. 35 El. 1. the penalty shall be recovered by debt, &c. in B. R., C. B., or exchequer; yet, by the st. 3 Jac. 4. justices of peace at sessions may enquire of all offences against former laws for not repairing to church.

By the st. 29 El. 6. and 3 Jac. 4. on an indictment at the assizes or sessions, for not repairing to church or sacrament, proclamation may be made that the party render himself to the sheriff by the next assizes or sessions, and if he appears not, his default shall be recorded, and there shall be judgment against him, as if convicted by verdict.

By the st. 3 Jac. 4. the 12*d.* for every Sunday may be levied by one justice, on confession or oath, within a month after the fault, by distress and sale; and for want of distress, by imprisonment till payment.

If there be a conviction upon the st. 29 El. 6. there shall be no information by an informer afterwards upon the st. 28 El. 1. Lane, 60.

By these statutes, if a person be convicted for a monthly absence from church, the conviction shall be certified into the exchequer, and if he pay not, within Easter or Michaelmas term after, 20*l.* for every month in the indictment; and 20*l.* for every month after, without other indictment, until his conformity or death; process may go out of the exchequer to seize all his goods and two parts of his lands and tenements.

And by the st. 3 Jac. 4. the king may either accept 20*l.* *per mensem*, or issue process against his goods, or two parts of his lands at pleasure.

By the st. 23 El. 1. of which justices of the peace may enquire, he who keeps a schoolmaster who resorts not to divine service for a month, or is not allowed by the bishop, forfeits 10*l.* *per mensem*, and such schoolmaster shall be disabled to teach youth, and suffer a-year's imprisonment. And by the st. 1 Jac. 4. he who retains, forfeits 40*s.* *per diem*.

By the st. 35 El. 1. (declared to be in force by the st. 16 Car. 2. 4.) if a person above sixteen, who hath without cause absented a month from church, persuade any other not to resort to divine service or communion,

munion, or to impugn the queen's authority, he shall be committed without bail, till he conform; and if he conform not in three months on request by the bishop, a justice of peace, or minister of the parish, shall at the assizes or quarter-sessions abjure the realm, and forfeit all his goods and lands during life; which abjuration at the sessions the justices shall certify to the assizes.

By, the st. 3 Jac. 4. if any willingly keep or harbour in his house or service any servant or stranger, except parent or ward, who shall, without cause forbear for a month together to resort to divine service, he shall forfeit 10*l.* *per mensem*.

But, by the st. 1 W. & M. 18. the said statutes extend not to dissenters, who acknowledge the Trinity, and are not Popish recusants, who shall take the oaths of allegiance and supremacy, and subscribe the declaration in the st. 30 Car. 2. st. 2. or shall make the said declaration, and the declaration of fidelity and profession of belief there prescribed, which the justices of peace, at their quarter-sessions, shall administer and record, and who shall go to any open religious assembly allowed by that act.

A *feme-covert* is within the st. 1 El. & 23 El. and an information lies against the husband. Dub. Sav. 25. R. 2 Cro. 529.

But by the st. 7 Jac. 6. if she does not conform within three months after conviction, she shall be committed without bail by two justices, &c. till conformity, unless the husband pays 10*l.* per month, or a third part of all his lands at his election.

Yet, this stat. 7 Jac. is no excuse upon the other statutes. R. 2 Cro. 529.

If the information be for ten months, it is well, though an absence for a year be alleged. R. 2 Cro. 530.

The information may be in C. B. or exchequer, since the st. 28 (or 29.) El. 6. as well as in B. R. Cont. 11 Co. 60. b. 61. a. R. acc. Hob. 204.

## (F) Profanation.

By the st. 1 Ed. 6. 1. if any deprave or use contemptuous words of the sacrament, three justices of the peace (*quorum unus*) may take information by two witnesses within three months, bind him to the quarter-sessions, where he may be indicted, and, if convicted, suffer imprisonment, fine, and ransom, at the king's pleasure.

By the st. 2 & 3 Ed. 6. 1. and 1 El. 2. if any minister preach or speak in derogation of the common prayer, being convicted at the next sessions by verdict, confession, or notoriety of the fact, he shall for the first offence lose a year's profits of all his spiritual promotions, and be imprisoned six months without bail, and if he have no spiritual promotion, twelve months; for the second offence shall be deprived *ipso facto* of spiritual promotions, and suffer a year's imprisonment, or having no spiritual promotion, during life; for the third offence shall be deprived and suffer imprisonment for life. And if any, by songs, &c. deprave or despise the common prayer book, or cause any to use another form, or interrupt the using it, or the ministration of the sacraments, being convicted *ut supra*, for the first offence he shall forfeit 100 marks, or on non-payment in six weeks be imprisoned six months without bail; for the second offence 400 marks, or on non-payment

## SAFE CONDUCT.

a year's imprisonment; for the third offence all his goods and chattels, and imprisonment for life.

As to profanation of the Sabbath, vide in Temps, (B 3.)

As to profanation by cursing and swearing, &c. vide in Justices of Peace, (B 23.)

Vide more concerning the Sacrament, in Officer, (K 7.)

## SAFE CONDUCT.

Vide ADMIRALTY, (E 8.) — PRÆROGATIVE, (D 5.)

## [SAINT ALBAN'S.]

[The successors of the modern recorder of St. Albans, named in the charter of Cha. 2., have no right to appoint a deputy, the power therein given being confined to himself. 12 East, 559.]

[SAINT ANDREW'S, AND SAINT GEORGE'S,  
HOLBORN.]

[Masters in chancery are not rateable under the paving act, 11 Geo. 3. c. 22. for their apartments in Southampton Buildings. 3 B. & P. 129.]

## [SAINT DOMINGO.]

[During the late war, such ports in St. Domingo as were under the dominion of Christophe, were considered neutral. 2 Taunt. 344.]

## [SAINT LEONARD, SHOREDITCH.]

[An appeal under st. 8 Geo. 3. c. 33., (relating to the paving, &c. of St. Leonard's Shoreditch) may be to the sessions, either of London or Middlesex. 4 T. R. 701.]

## [SAINT MARTIN'S.]

[A collector of the assessed taxes is not prohibited from acting as a committee-man under 23 Geo. 3. c. 90. s. 4., for paving and lighting St. Martin's Parish. 1 M. & S. 482.]

## [SAINT NICHOLAS, DEPTFORD.]

[The stat. 27 Geo. 2. c. 38. s. 6., authorizes the churchwardens and parishioners, from time to time, to remove the collector appointed under its provisions, and appoint another; sect. 10., provides that certain governors and directors shall be appointed annually, and fixes the days. This circumstance of providing for an annual appointment  
in

in the one case, but not in the other, shows that the other appointment was not to be annual. 3 M. & S. 502.]

### [SAINT NICHOLAS, ROCHESTER.]

[The guardians of the poor of St. Nicholas, Rochester, are not a corporate body. They are regulated by statute 49 Geo. 3. c. 40. (local and personal.) A *mandamus* to the guardians, to restore the clerk and treasurer appointed under that act, does not lie, since he is merely a servant to a body of private individuals. 4 M. & S. 324.]

### SALE.

Vide ACTION ON THE CASE FOR A DECEIT, (A 8, 9.) — BARGAIN AND SALE. — BIENS, (D 3.) — BYE-LAW, (E 2.) — DISTRESS, (D 7, 8, 9.) — MARKET, (E). — PARLIAMENT, (H 5.) — POPERY, (B 11.) — SEWERS, (E 8, &c.)

### Sale of offices.

Vide OFFICER, (K 1.) — PLEADER, (2 W 27.)

### [SALVAGE.]

[Where a ship cast on shore is not a wreck, the lord of the manor cannot entitle himself to salvage by interposing to secure it, contrary to the owner's express dissent. 2 Taunt. 302.]

[A passenger who, in the hour of danger, takes the command, the ship abandoned by the master, and part of the crew, and brings her safe into port, and to whom the owner afterwards acknowledges that she was saved by his exertions, is entitled to salvage. 3 B. & P. 612.]

[Salvage is a compensation to the salvors, not merely for the restitution of the property which has been made by them to the prior owners, for that is properly an act of mere justice on their part, but for the risk and hazard incurred by them, and for the beneficial service they have rendered the former owners in rescuing that property from the danger in which it was involved; and the persons to contribute to that salvage are the persons who would have borne the loss, had there been no such rescue, and who of course reap the benefit of that rescue. 4 M. & S. 159.]

[A ship is let to freight from London to Lima under a charter-party, at so much per ton per month, payable at the custom-house in London. The outward cargo is delivered, and homeward cargo taken in at Lima, with which she sails, is captured, but re-captured, arrives and reports in London. Certain expences are incurred in obtaining restitution of the ship and cargo, and salvage decreed to the re-captors. The proceeds of the homeward cargo fall short of the freight due. Question, who is liable for payment of the salvage and the expences of obtaining restitution; the ship-owner or the freighter, or both; and in what proportions? Held, 1. As to the salvage, that the ship-

owner alone was liable, since salvage is due from those alone who are benefited by the re-capture. Here, had there been no re-capture, the freighter would not have been liable for freight, since then the ship could not have reported in London, upon which condition only was it payable; By the re-capture he is made liable, and all that he gains thereby are his goods, whose value will not meet the freight, so that he is damaged; and a loser by the re-capture, instead of a gainer.

2. That the freighter alone was liable for so much of the charges as were paid to obtain restitution of the cargo, since he alone was benefited by the restitution. Had the cargo never been restored, the ship-owner would not have suffered, since his freight was payable, not on delivery of the cargo, but on reporting in London; it was therefore immaterial to him if he came home in ballast; but the freighter was benefited, since thereby he acquired a fund wherewith to discharge a portion of the freight. 4 M. & S. 152.]

[The principle upon which freight contributes in the case of salvage is, that but for the re-capture, for which the salvage is paid, it would have been lost. 4 M. & S. 159.]

[The stat. 12 Ann. st. 2. c. 18. s. 2. only applies where the salvage is made by the public officers as therein provided, not therefore where made by a third person at the master's request. 8 East, 57.]

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### SANCTUARY.

Vide ABJURATION, (D).

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### SATISFACTION.

Vide ACCORD.

Of a bond.

Vide CHANCERY, (4 D 1. 20. — 4 P.)

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### SCANDALUM MAGNATUM.

Vide ACTION UPON THE CASE FOR DEFAMATION, (B 1, &c.) — LIBEL, (C 4.)

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### SCAVENGERS.

[A scavenger's rate cannot be made by one liberty of a parish, where none of the churchwardens or overseers reside. Str. 630.]

[New parish cannot make scavenger's rate, but continues contributable to the old parish till a perpetual division is made as to the other rates. Fort. 324.]

[Order to appoint scavengers must set out that they are able persons, or it is bad. Andr. 72.]

[Quarter-sessions have no power on appeal to make a new scavengers' rate, though they may quash the rate appealed from. 5 B. M. 1488.]

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### SCIENTER.

Vide ACTION ON THE CASE FOR DECEIT, (F 3.)

### SCIRE FACIAS.

Vide BAIL, (R 1, &c.)—DISMES, (M 8.)—EXECUTION, (A 4.—I 4.)—  
FINE, (E 15.)—OFFICER, (K 14.)—PATENT, (F 4, &c.)—PLEADER,  
(3 B 17.—3 L 1, &c.) PRÆROGATIVE, (D 69.)

### SCHOOLS AND SCHOOLMASTER.

Vide UNIVERSITY, (D)—USES, (N 3.)

## SCOTLAND.

(A) Scotland; the antiquity of it. *infra*.

(B) Berwick. *infra*.

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crown. p. 313.

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(D 12.) Of admiralty. p. 319.

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(A) Scotland; the antiquity of it.

Scotland is another kingdom of itself distinct from the kingdom of  
England. Pl. Com. 376. a.

(B) Berwick.

Berwick was antiently part of Scotland.

And though it was annexed to England in the time of Ed. 4. yet it  
shall be governed by the laws of Scotland and the customs there.  
1 Sid. 382.

And therefore a fine or ejectment cannot be in the courts of Westminster for land in Berwick. 1 Sid. 382.

[Berwick has no criminal law but the law of England, nor jurisdiction in criminal matters, but with such reference to it as includes B. R.]

[*Venire* does not run there, because they are exempted from being summoned out of the borough to serve on juries.]

[Original writs do not run there.]

[Other writs, ministerially directed, do.]

[Writs, not ministerially directed, *mandamus*, prohibition, *habeas corpus*, *certiorari*, run there.]

[Informations may be granted by B. R. or filed by attorney-general.]

[Where B. R. has jurisdiction of the matter, and it cannot be tried in the place, it shall be tried as near as may be; thus, with regard to Berwick, it shall be tried in Northumberland, and that on a suggestion, that *venire* does not run there, and they are exempted from serving juries out of the borough.]

[All rules of common law, that hold as to Wales, conclude *à fortiori* to Berwick.]

[Before the union, Berwick was bound by English general acts of parliament, without being named, which, when done, is superfluous; it is now bound by all general laws. 2 B. M. 834.]

### (C) How dependent upon England.

But Scotland was held of the king of England. Pl. Com. 368. b.

And is within the see and seigniorship of the king of England. Ibid.

Yet Scotland is a distinct kingdom.

And therefore a fine and non-claim do not bar him who was in Scotland. Pl. Com. 376. a.

### (D 1.) How united to it.

By the st. 1 Jac. 1. the parliament congratulates the famous union, or rather, re-uniting of two mighty famous and antient kingdoms (yet antiently but one) under one imperial crown, &c.

By the st. 1 Jac. 1, 2. commissioners were appointed to treat with commissioners to be appointed by the parliament of Scotland for a further union between the said kingdoms of England and Scotland.

By the st. 3 Jac. 1. 3. the effect and result of such treaty was prolonged from being laid before the houses of parliament till some subsequent session of the same parliament.

And in pursuance of the same treaty, by the st. 4 Jac. 1. the hostile laws made in either of the kingdoms were to be repealed, and regulations were made for trial of offenders in each kingdom.

By the st. 22 Car. 2. 9. the king was empowered to nominate commissioners to treat of an union of both kingdoms.

By the st. 3 & 4 Ann. 7. commissioners, to be appointed by her majesty, may meet commissioners to be appointed by the parliament of Scotland, to treat of an union of both kingdoms, and such other matters as they shall think convenient for the common good of both, who shall reduce their proceedings into writing, to be laid before the queen, and the parliaments of England and Scotland, &c.

22 July,

22 July, 5 Ann. the commissioners of both kingdoms agreed on twenty-five articles of union.

By the st. 5 Ann. 8. reciting the said articles, which, with some additions and explanations, had been confirmed by statute in Scotland, 16 January, 5 Ann. and reciting an act passed in Scotland for securing the protestant religion and presbyterian church government, and an act in England, 5 Ann. 5. for securing the church of England, as by law established, the said articles as confirmed by the parliament of Scotland, and the said two acts are enacted to be the complete and entire union of the said two kingdoms of England and Scotland; and by the said statute an act passed in Scotland for settling the manner of electing sixteen peers and forty-five members for the representing Scotland in the parliament of Great Britain, is declared to be as valid as if it had been part of the articles of union.

(D 2.) The effects of the union : — In respect of the crown.

By art. 1. on 1st May 1707, and for ever after, the two kingdoms of England and Scotland shall be united into one kingdom by the name of Great Britain.

The ensigns armorial shall be as the queen appoints, and the crosses of St. Andrew and St. George conjoined and used in all flags, banners, &c. at sea and land.

By art. 16. the coin shall be of the same standard and value through the united kingdom, as now in England.

By art. 24. there shall be one great seal for the united kingdom, different from that of either kingdom; but the quartering the arms, and precedency of Lyon king of arms, shall be left to her majesty.

Such great seal shall be used for writs of election, treaties, orders of state, &c. which concern the whole kingdom of England, and the seal in Scotland shall be for the private rights and grants of Scotland.

By art. 2. the succession to the monarchy of the united kingdom shall be as settled by the st. 12. W. 3. 2. for want of issue of her majesty, to the princess Sophia and the heirs of her body, being protestants, &c.

And all papists, or marrying papists, shall be excluded, as by the st. 1 W. & M. sess. 2. c. 2.

By art. 16. the coin shall be of the same standard and value through the kingdom, as now in England.

By art. 24. privy-seal, signet, casset, signet of justiciary court, quarter seals, and seals of court, now used, shall be continued, subject to the regulations of parliament.

And the crown, sceptre, sword of state, and all records, &c. public or private, shall be kept in Scotland, &c.

(D 3.) Of religion.

By the st. 16 January, 5 Ann. in Scotland, confirmed by the st. 5 Ann. 8. and declared to be a fundamental and essential part of the union, the true protestant religion, and the worship, discipline, and government of the church of Scotland is established to continue without any alteration for ever, especially the 5th act, 1 W. & M. ratifying the confession of faith, and settling the presbyterian church government, and

and all other acts relating thereto, in prosecution of the claim of right, 11 April 1689.

And the true protestant religion contained in the said confession of faith, with the form and purity of worship presently in use in the said church, and its presbyterian church government and discipline, viz. the government of the church by kirk-sessions, presbyteries, provincial synods, and general assemblies, all established by the said acts pursuant to the claim of right, shall continue unalterable; and the said presbyterian government shall be the only government of the church in the said kingdom of Scotland.

And the universities and colleges of St. Andrew's, Glasgow, Aberdeen, and Edinburgh, as now established by law, shall continue for ever; and no professors, principals, &c. or others, bearing office in any university, college or school, shall be capable, &c. but such as own the civil government, and, before their admission, profess and subscribe the said confession, and conform to the worship presently in use, and submit to the government and discipline thereof, and never endeavour the subversion or prejudice thereof directly or indirectly, &c.

And no subject, &c. shall be liable to any oath, test, or subscription, contrary to the said true protestant religion, church government, worship or discipline; and the successor to the crown shall swear to maintain, &c. the same inviolably.

#### (D 4.) Parliament: — Election of peers.

By art. 9. the united kingdom of Great Britain shall be represented by one and the same parliament.

By art. 22. of the peers of Scotland, sixteen shall be the number to sit in the house of lords; and, upon her majesty's pleasure, to hold any parliament of Great Britain, till further provision by the parliament of Great Britain, a writ shall issue to the privy council of Scotland, under the great seal, to cause sixteen peers to be summoned, and forty-five members, &c. elected, &c. And the names of the persons so summoned and elected shall be returned by the said privy council into the court from whence the writ issued.

By the st. 6 Ann. 23. the proclamation shall be under the great seal of Great Britain, commanding all peers to meet, &c., and such proclamation shall be published at Edinburgh, and all the county towns in Scotland, twenty-five days before the time of meeting.

By the st. in Scotland, 5 Feb. 1707, the said writ shall contain a warrant to the privy council, requiring them to issue a proclamation to the peers of Scotland to meet at such time and place in Scotland, as her majesty thinks fit, to elect the said sixteen peers, and requiring the lord clerk-register, or two of the clerks of session, to attend and administer the oaths required, and ask the votes, and, having made up the lists in the presence of the meeting, to return the names of the sixteen peers chosen (under the subscription of the lord clerk-register, clerk, or clerks attending) to the clerk of the privy council.

And by the same statute, the said sixteen peers shall be named by the peers of Scotland out of their own number by open election and plurality of voices of peers present, and proxies for the absent (the said proxies

proxies being peers, and producing a mandate signed before witnesses, and both constituent and proxy being qualified by law).

And such absent peers may send lists of the peers by them thought fit, validly signed, &c. which shall be reckoned as if they had been present and given in such list.

In case of death of any such peer, &c. they shall nominate another in like manner.

By art. 23. the said sixteen peers shall have all privileges of parliament, as peers of England have, or shall have, particularly the right of sitting on trials of peers during the being, or in the intervals, of parliament.

By the st. 6 Ann. 23. peers of Scotland, before qualified to elect the sixteen peers, shall take the oaths and subscribe the declaration, &c. And if absent, there shall be a certificate thereof, &c.

Peers, who are also of England, shall sign their proxies and lists, as peers of Scotland; and no peer shall be capable of more than two proxies at a time.

After the election, the lord clerk-register, &c. shall certify the names of the sixteen peers elected to the chancery of Great Britain.

#### (D 5.) Of the commons.

So, by art. 22. the representatives of Scotland in the house of commons of parliament in Great Britain shall be forty-five.

And by the st. in Scotland, 5 Feb. 1707, on writ to the privy council, &c. they shall issue a proclamation *ut supra*, requiring also the freeholders, for the respective shires and stewartries, to elect their commissioners, and Edinburgh and the other royal burghs to elect the commissioners to be sent to the several districts, &c.

But, by the st. 6 Ann. 6. there shall be a writ to the sheriff, &c. who shall make his precept to the borough of Edinburgh, and the other burghs, &c.

And, by the statute in Scotland, 5 Feb. 1707, of the forty-five representatives of the commons, thirty shall be chosen by the shires and stewartries, each one (except Caithness, which shall chuse by turn with Bute, Cromarty with Nairn, Kinross with Clackmannan) and fifteen for the royal burghs, viz. Edinburgh one, and the rest shall be divided into fourteen classes or districts, and each burgh chusing a commissioner, those commissioners shall elect one for each district, &c.

If the votes of the commissioners in any district be equal, the presiding commissioner (for the burghs shall preside by turns in every district) shall have the casting vote, &c.

On death or vacancy, the same shire or district shall chuse another in the same manner, &c.

None shall be capable to elect or be elected, unless he be of the age of twenty-one years complete, and a protestant, and, if required, subscribe and swear the *formula* in the third act of the 8th and 9th session of W. 3. intituled, An act to prevent the growth of popery.

Nor, unless now by the laws of this kingdom capable to elect or be elected a commissioner to the parliament of Scotland.

By art. 22. every peer and member shall take the oaths appointed by the st. 1 W. & M. s. 1. c. 8. and 1 Ann. st. 1. c. 22. and subscribe the declaration by the st. 30 Car. 2. st. 2. in the same manner and under

under the same penalties, as members of both houses of parliament in England.

By the st. 6 Ann. 23. voter, before the election of burgess or commissioner, &c. shall, if required, take the oaths, or, if a quaker, the affirmation.

#### (D 6.) Peerage, &c.

By art. 23. all peers of Scotland shall be peers of Great Britain, and have precedency next after peers of like degrees in England, and before all of like degrees after to be created, and shall be tried as peers, except that of sitting in the house of lords, and the privileges depending thereon, and particularly the right of sitting on the trials of peers.

By the st. 6 Ann. 23. for the trial of a peer for treason or felony, a commission shall go to the justices to enquire by oaths, &c. of all treasons, felonies, &c. committed in such county by the peer, &c. who shall take inquisition in the same manner, which shall be of the same effect, and proceeded on in the like method, as an indictment before justices of oyer and terminer for the like offence.

By art. 20. all offices, jurisdictions, &c. heritable, or for life, shall be reserved to the owners as rights of property.

By art. 21. the rights and privileges of the royal burghs shall remain entire after the union.

By art. 19. the privy council in Scotland was to continue till the parliament established a more effectual method, &c.

By the st. 6 Ann. 6. the queen shall have but one privy council for Great Britain, &c. but justices of peace shall be for every shire, stewartry, and such cities, burghs, &c. as the queen thinks fit, who shall have the same power as to peace, as by the laws of Scotland justices of peace had or have by the laws of England.

[It was not the intention of the act of union, that the privileges hitherto peculiar to English dignitaries, should be communicated to the dignitaries of Scotland; but only that Scotchmen should have the same general privileges, as subjects, with Englishmen. 1 T. R. 44.]

#### (D 7.) Trade.

By art. 4. all subjects of the united kingdom shall have full freedom and intercourse of trade or navigation to and from any place in the same kingdom and the dominions belonging thereto.

And there shall be a communication of all other rights and privileges, which belong to subjects of either kingdom, &c.

[But statutes allowing certain privileges to the members of the universities, do not extend to the Scotch universities, unless it be so expressed. 1 T. R. 49.]

[And therefore a diploma conferring the degree of doctor of physic, granted by any of the universities of Scotland, does not give a qualification to the eldest son of such graduate to kill game under 22 & 23 Car. 2. c. 25. Id. Ibid.]

By art. 5. all ships, &c. of subjects of Scotland, at the union, though foreign built, shall be deemed of the built of England.

By art. 6. all parts of the united kingdom shall be under the same prohibitions, restrictions, and regulations of trade, have the same allowances,

ances, encouragements, and drawbacks, and be liable to the same customs and duties on import and export; and the prohibitions, &c. allowances, &c. and customs, &c., settled in England at the union, shall after take place through the whole united kingdom, except the duties on export and import of particular commodities, from which any subjects of either kingdom are exempt by their private rights, which shall remain entire, &c.

[Scotch manufactures may be vended in England, by wholesale, without any licence from the hawkers' office. 1 Bl. Rep. 364.]

No Scotch cattle carried into England shall be liable to other duties than the cattle of England are.

When oats are at 15s. sterling per quarter, or under, 2s. 6d. per quarter shall be paid for oatmeal exported, as long as rewards are allowed for the exportation of other grain, and the beer of Scotland shall have the same reward as barley.

And the prohibition in Scotland of importation of victuals from Ireland, or other place beyond sea, shall remain, till more effectual provision against such importation.

By art. 8. foreign salt imported in Scotland shall be charged with the same duties as in England, and so shall salt made in Scotland, if used for flesh exported, or provisions of ships, &c.

And the laws in Scotland for curing, &c. herring, white fish, and salmon with foreign salt only, &c. shall be continued, subject to alterations by the parliament of Great Britain; and fish so cured, &c. exported from Scotland, shall have the same premiums and drawbacks as from England.

And there shall be allowed 10s. 5d. per barrel for white herring, and 5s. per barrel for beef and pork, salted with foreign salt, exported from Scotland beyond sea.

By art. 17. the same weights and measures shall be used through the united kingdom as now in England, and standards shall be sent from those kept at the exchequer at Westminster to be kept by those burghs in Scotland which have now of right the keeping of such standards, subject to regulations by parliament.

#### (D 8.) Taxes.

By art. 7. all parts of the united kingdom shall be for ever liable to the same excises on all exciseable liquors, except that thirty-four gallons barrel of beer and ale English, being twelve gallons Scots present measure, shall pay but 2s. on the account of the present excise, which after the union shall take place, on all other liquors as settled in England.

But by art. 9. when the land-tax in England is 1,997,763l. 8s. 4½d., Scotland's *quota* shall be 48,000l. free of all charges; and so proportionably, to be collected as the cess now in Scotland.

And by art. 8. Scotland shall be exempt from the duty on home-made salt for seven years, and after from the duty by the st. 9 & 10 W. 3. of 2s. 4d. per bushel, but shall pay if imported into England. Vide 3 G. 2. c. 20. sect. 3.

So, by art. 10. from duties on stamped paper, vellum, and parchment, by the acts then in force.

By

By art. 11. from duties on windows and lights, which determine 1st August 1710.

By art. 12. from duties on coals, culm, and cinders, used in Scotland till 3d September 1710.

By art. 13. from duty on malt till 24th June 1707; and by art. 14. during the present war.

By art. 14. from all other duties laid on before the union, except those consented to in this treaty.

So, by the art. 15. Scotland shall have \$98,085*l.* 10*s.* as an equivalent for the customs and excises with which Scotland after the union will be liable towards the debts of England, (the customs of Scotland being 30,000*l.* *per annum*, and those of England 1,341,559*l.* *per annum*, the excises in Scotland \$3,500*l.* *per annum*, and those in England 947,602*l.* *per annum*,) to be applied, &c.

#### (D 9.) Laws.

By art. 25. all laws and statutes in either kingdom, so far as they are inconsistent with any article of the union, shall cease and be void.

By art. 18. laws about the regulation of trade, customs, and excises to which Scotland is liable, shall be the same in Scotland as in England.

But by the same art. all laws in Scotland, not inconsistent with the treaty of union, shall remain in the same force as before, but alterable by the parliament of Great Britain.

And the laws which concern public right, policy, and civil government, may be made the same through the united kingdom, but no alteration shall be in laws which concern private right, except for evident utility of the subjects of Scotland.

[The statute of limitations extends to bar plaintiffs resident in Scotland. 1 Bl. Rep. 286.]

[If money is left in trust to be laid out in lands in England for A., &c. and by act of parliament it is secured on A.'s estate in Scotland, during his minority, it is to be considered as an estate in England. 2 Vesey, 381.]

[The purchase-money for heritable jurisdictions, whilst remaining in the exchequer in England, considered as real estate in Scotland. Ibid.]

[By stat. 13 G. 3. c. 31. persons against whom warrants are issued by justices in England for offences, who shall escape into Scotland, may be sent back by Scotch justice to the county where offence committed; and so, *vice versâ*, from England to Scotland.]

[Persons stealing in Scotland may be tried where he is found with the goods in England, and *vice versâ*; and so receivers of stolen goods.]

#### (D 10.) Courts : — Court of session.

By art. 19. the court of session, or college of justice, shall remain in all time coming in Scotland, as now constituted, and with the same authority and privileges, subject to such regulations for the better administration of justice as shall be made by the parliament of Great Britain.

None shall be named ordinary lords of session but those who have served

served five years in the college of justice, as advocates or principal clerks of session, or ten years as writer to the signet, &c. so as the qualification for ordinary lords of session may be altered by parliament.

By the st. 6 Ann. 6. circuit courts shall be twice a-year, as by the st. in 2d sess. Car. 2. 3.

(D 11.) Of justiciary.

So, by art. 19. the court of justiciary shall remain in all time, &c. subject to regulations, &c. without prejudice to other rights of justiciary.

(D 12.) Of admiralty.

By art. 19. all admiralty jurisdictions shall be under the lord admiral or commissioners of admiralty in Great Britain.

But, the court of admiralty now in Scotland shall be continued, and all reviews, reductions, or suspensions of sentences in maritime causes, till the parliament of Great Britain make regulations as expedient for the whole united kingdom, so as in Scotland be always a court of admiralty for determining all maritime causes relating to private rights in Scotland.

And the heritable rights of admiralty and vice-admiralty in Scotland shall be reserved to the proprietors as rights of property, subject, the manner of exercising, to the regulations of parliament.

(D 13.) Other courts.

By art. 19. all other courts in Scotland shall remain subject to alterations by parliament.

And all inferior courts there remain subordinate, as now, to the supreme courts of justice there; and no causes in Scotland shall be cognoscible in chancery, B. R., C. B., or other court in Westminster-hall, nor shall they, or any court of the like nature, have power to review the sentences, &c. in Scotland, or stop the execution of the same.

(D 14.) Exchequer.

By art. 19. the court of exchequer shall be in Scotland, having the same power as in England for deciding questions about the revenues of customs and excises there.

And shall have the same power as the present court of exchequer in Scotland of passing signatures, gifts, tutories, &c.

By the stat. 6 Ann. 26. (till which by art. 19. the exchequer before in Scotland continued) a court of exchequer was erected in Scotland.

[Whether the court of exchequer has the exclusive jurisdiction concerning the revenue arising there (as on a bond to pay duties) Qu. Bunb. 280.]

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SEA,

Vide ADMIRALTY per totum.—NAVIGATION (A B).—  
PREROGATIVE, (B 1.)

SEAL.

SEDUCTION.

SEAL.

Vide FAIT, (A 2.—F 2.)—PROCESS, A 3.)

*The king's seals.*

Vide JUSTICES, (K 6.)—PATENT, (C 1, &c.)

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[SEAL-OFFICE.]

[Rule of K. B. regulating the opening of the seal-office. Trin. 54 Geo. 3. 3 M. & S. 163.]

[Rule relative to the opening of the seal office. C. B. Trin. 54 Geo. 3. 1 Mars. 345; 5 Taunt. 702.]

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SEARCH AND SEIZURE OF FORFEITED  
GOODS.

Vide TRADE, (C 6.)

---

SEAT IN A CHURCH.

Vide ACTION ON THE CASE FOR A DISTURBANCE, (A 3.)—  
EGLISE, (G 3.)

---

SECRETARY OF STATE.

Vide OFFICER, (E 8.)

---

SECTA AD MOLENDINUM.

Vide DROIT, (H.)

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[SECURITIES.]

[If a person has two securities; thus, a mortgage and a bond, he may proceed on both at the same time. Dougl. 417.]

[That the acceptance of an additional security may suspend the right of action on the original debt, it must be given for the whole debt (or composition agreed for in lieu thereof). 1 Taunt. 526.]

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SE DEFENDENDO.

Vide JUSTICES, (M 18.)

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[SEDUCTION.]

[To maintain an action *per quod servitium amisit*, seduction for example, the relation of master and servant must subsist between the plaintiff and the party seduced. 5 East, 45. 1 Smith, 393. This is made

made out by proving either an express contract, or acts of service; and the slightest are sufficient; the circumstance that no wages are given, is immaterial. 2 T. R. 168.]

[The relation of master and servant subsists between the father and his daughter, though she is of age, provided she performs acts of service. 2 T. R. 166.]

[A parent cannot sue for his daughter's dishonour, when, at the time of her seduction, she was in another's service. 3 Burr. 1878. 5 East, 45. 1 Smith, 333.]

[In an action for seduction, the relation of master and servant between the plaintiff and the party seduced, must be established, as by proving acts of service. 5 T. R. 360.]

[Vindictive damages may be given for seducing an adopted child. 11 East, 23.]

## SEIGNIORY.

## (A) Seigniorv : What shall be: How created: In capite.

Seigniorv imports the dominion or royalty which any one has. And it is a seigniorv in gross, where the dominion is founded in his person; as, where a man holds of the king *in capite*, or of a common person in gross. Co. L. 108. a. 12 Co. 136. Hob. 90.

Or, when he has a royalty in respect of an honour, manor, &c.; of which, vide Honour.

If the king creates a tenure of himself, without saying of any manor, castle, honour, &c. it will be a tenure *in capite*, for he holds of him as of his crown. Co. L. 108. a. 12 Co. 135. Sav. 45.

Though the tenure be in *socage*, and not in *chivalry*. Co. L. 108. a.

But where a subject creates the tenure, though the seigniorv afterwards escheats, &c. to the king, it will be a tenure of the person of the king, but not *in capite*. Co. L. 108. a.

So, if the tenure be created by the king *ut de manerio*, &c. *in capite*, the tenure will be of the manor, and the words *in capite* shall be rejected. R. 12 Co. 136.

The king is lord paramount of all the lands in the kingdom. 2 Inst. 501. Vide Homage.

So, before the st. W. 3. 18 Ed. 1. 1. *quia emptores terrarum*, if a subject had enfeoffed, &c. another to hold of himself by such services as he pleases, it was a *mesne* seigniorv in the feoffor. 2 Inst. 501.

And if he had enfeoffed another generally, without mention of any tenure, the feoffee held of him by the same services by which he held. 2 Inst. 501.

So, since the st. *quia emptores*, if a tenant makes a gift in tail, the donee holds of the donor. 4 H. 6. 20.

Though the gift be *tenend. de capitali domino*; for these words shall be rejected. R. 4 H. 6. 20, 21.

If the tenant had enfeoffed another only of part of his tenement, he must hold of his feoffor; for the seigniorv cannot be divided by the act of the tenant, and therefore there could not be a feoffment of parcel to hold of the lord paramount. 2 Inst. 65.

Yet before the st. *quia emptores*, the tenant might enfeoff another of the whole, to hold of the lord paramount. 2 Inst. 65.

But by the st. *quia emptores terrarum*, if any enfeoff another of his tenements, or any part of them, the feoffees shall hold of the lord paramount by the same services by which his feoffor held, or *pro ratâ*, if the feoffment be only of part. 2 Inst. 501.

The tenure shall be of the next lord paramount. Ibid.

And by the same services, by which the feoffor ought to hold, if he was seised of the fee, or in his own right. 2 Inst. 502.

Or, (if it cannot be by the same, as where the feoffor holds in *frankalmoigne*,) as near as it can. 2 Inst. 502.

### (B) How extinguished.

But if the tenant enfeoffs the king, the seigniorship is extinct; for the king cannot hold of any person. Dy. 10. a.

So, if he gives to A. in tail, the remainder of the king in fee, if the king accepts the remainder. R. Dy. 154. b.

So, if tenant *paravail* enfeoffs the lord paramount, the *mesnalty* will be extinct, for the lord paramount cannot hold of any person more base. Dy. 10. a.

So, if a tenancy descends to the king and another, the king may compel the other to do the entire service or not, at his election. R. Dy. 285. b.

But if the king afterwards enfeoffs another *tenend. de capitali domino per servitia debita* the *mesnalty* and seigniorship paramount are revived. 2 Inst. 501.

So, if the lord releases the seigniorship to the tenant, or releases the land, the seigniorship is extinct. Lit. s. 454.

So, if the lord paramount confirms the estate of the *mesne*, to hold by *socage*, or a less service, the tenant *paravail*, who holds by the same services, after such confirmation shall hold by *socage*, &c. 2 Inst. 501.

Vide more concerning Seigniorship, in Grant, (E 4.)

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## SEISED TO USES.

Vide USES, (E—F).

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## SEISIN.

### (A) Seisin in fact.

(A 1.) When necessary. p. 323.

(A 2.) What shall be a seisin in fact. p. 323.

### (B) Seisin in law.

(B 1.) When sufficient. p. 323.

### (C) What seisin is sufficient to maintain an assize. p. 323.

### (D) What not. p. 325.

### (E) What is sufficient to make a distress. p. 325.

### (F) Disseisin.

(F 1.)

- (F 1.) What shall be. p. 326.
- (F 2.) What not. p. 328.
- (F 3.) What shall be so, or not, at election. p. 329.
- (F 4.) Who shall not be a disseisor. p. 330.

**(A) Seisin in fact.**

**(A 1.) When necessary.**

Seisin imports the having possession of an estate of freehold or inheritance in lands or tenements. Co. L. 153. a.

Seisin is in fact or in law. Co. L. 29. a.

Seisin in fact is necessary to make a man tenant by the curtesy, where it was attainable. Co. L. 29. a. Vide Estates, (D 1.)

And to maintain an assise. 4 Co. 9. a. Vide post, (C).

Or, a writ of right. 4 Co. 9. a.

So, a writ of *aiel, mort d'ancestor*, &c. 4 Co. 10. a.

And therefore where the st. 32 H. 8. 2. speaks of seisin within sixty years for a writ of right, fifty years for a writ of *aiel, cosinage, mort d'ancestor*, entry, &c. within thirty years for an assise, it shall be intended of an actual seisin. 4 Co. 10. a.

**(A 2.) What shall be a seisin in fact.**

A seisin in fact shall be attained by an actual entry into lands or tenements.

By an entry into part in the name of the whole.

So, a receipt of rents or profits will give an actual seisin.

So, if an heir demises for years, or at will, the entry of the lessee gives an actual seisin to the lessor. Vide Assise, (B 4.)

So, a recovery and execution thereon give an actual seisin. Vide post, (C).

[A. dies seised of four houses, leaving daughters by his first wife, and his second wife *ensient* with a son who is born, lives five weeks and dies; the mother, the daughters, and the son, live in one of the houses, the tenants of the other houses pay rent to the mother before the birth, during the life, and after the death of the son. This is actual seisin in the son, and the premises descend to his heir. 3 Wils. 516.]

**(B) Seisin in law.**

**(B 1.) When sufficient.**

A seisin in law is sufficient for an avowry upon a distress. 4 Co. 9. a. Vide post, (E).

**(C) What seisin is sufficient to maintain an assise.**

The plaintiff in an assise must have actual seisin of the lands or tenements for which he brings his assise; for it does not lie of a seisin in law. Lit. s. 681. 4 Co. 9. a.

What shall be an actual seisin, vide ante, (A 2.)

And therefore, if the plaintiff in an assise enters, or takes the profits of the land, that is sufficient for him to have an assise.

So, if a man receives rent, that is a sufficient seisin to have an assise of the rent.

So, if a man recovers rent, and the sheriff upon a writ of execution puts him in seisin of the rent.

Though he puts him in seisin only by parol upon the land. 2 Rol. 463. l. 40.

Or, by delivery of an ox, or other collateral thing in the name of seisin. 2 Rol. 464. l. 30. 463. l. 30. 32.

So, if he has judgment for a return irreplevisable. 4 Co. 9. b. 2 Rol. 464. l. 12.

So, if the tenant, upon a grant of rent, attorns to the grantee, and gives him money as parcel of the rent, that will be a sufficient seisin. 2 Rol. 463. l. 22.

So, if he gives a penny, &c. by way of seisin, though it be not given as parcel of the rent. 2 Rol. 463. l. 25. 4 Co. 10. a.

Or, gives an ox, cow, or other collateral thing, in the name of seisin. 2 Rol. 463. l. 27. 464. l. 25.

So, if a man takes the profits of an office, that is a sufficient seisin of the office to maintain an assise.

So, if he takes *3d.* of A. for a *capias*, it is a sufficient seisin of the office of filazer. 1 Rol. 270. l. 25.

So, if he takes 20s. of A. by way of composition for the fees of an office. R. 2 Lev. 120.

Though the defendant had possession of the office at the same time. 2 Lev. 120.

So, if he puts his hand upon the mace, which the disseisor of the office holds, and his hand upon the door of the house of commons, it is a sufficient seisin of the office of serjeant of the house of commons. R. 2 Lev. 120.

So, if he recovers damages in an action upon the case for his fees. Dub. 2 Lev. 108.

So, seisin of part of the rent is seisin sufficient to have an assise of the whole. 4 Co. 9. 2 Rol. 463. l. 50.

So, if a man grants several rents, an attornment by delivery of a penny in the name of seisin is sufficient for all the rents. 2 Rol. 463. l. 35. 4 Co. 8. b. 9. b.

So, if a man reserves upon a lease for life or years, a quartern of corn for the first year, and afterwards 50s. *per annum*, the seisin of the corn is sufficient for the 50s. rent; for the whole stands upon the same reservation. 4 Co. 9. a.

So, seisin by the ancestor is sufficient in an assise by the heir. Vide Assise, (A).

So in an assise of rent by a corporation sole, seisin by his predecessor. 2 Rol. 464. l. 5. 40.

So, seisin by the hand of the tenant paravail is sufficient for the lord paramount against the mesne. 1 Rol. 314. l. 47.

So, seisin by the husband binds the wife and her heirs. 1 Rol. 314. l. 55.

So, seisin by tenant by the curtesy binds the heir. 1 Rol. 315. l. 2.

So, seisin given of services by A. after a feoffment by him to B. and before notice of the feoffment, is sufficient for the lord in an assise against B., for till notice A. was his tenant, as to the avowry. 2 Rol. 464. l. 50.

So, seisin by the hand of the discontinuee of tenant in tail, though the lord

lord cannot avow upon him, and there is no privity between them. 2 Rol. 464. l. 52. 1 Rol. 314. l. 51.

So, by the hand of a disseisor, or other, who has a defeasible title, if it be without *ovvin*. 2 Rol. 464. l. 45. 1 Rol. 314. l. 50.

If a man makes a feoffment of a seignior upon condition, and afterwards enters for the condition broken; seisin of the services before the feoffment is sufficient for an assise after re-entry. 2 Rol. 465. l. 10. where, after re-entry, he distrains. 4 Co. 9. b. Vide post, (D.)

So, seisin by the feoffee before the condition broken. 4 Co. 9. b.

If a rent becomes seck without the act of the party himself, seisin before is sufficient for an assise afterwards; as, if the lord purchases, &c. of the tenant *paravail*, whereby the surplusage of the rent of the *mesmalty* is seck, seisin before of the rent-service is sufficient for that which is seck. 4 Co. 9. a.

### (D) What not.

But a seisin in law is not a sufficient seisin to have an assise. Vide ante, (C.)

So, an attornment to the grant of a rent, without payment of any part, or something given in the name of seisin, is not sufficient to maintain an assise. 2 Rol. 463. l. 15. 464. l. 20.

Though he attorned by delivery of a penny, if it were not given as part of rent, or in the name of seisin. 2 Rol. 463. l. 20.

So, a distress for a rent-seck, without more, is not a sufficient seisin to have an assise. 2 Rol. 463. l. 43.

So, seisin of one service is not sufficient to have an assise of another service, though it be inferior to it. 4 Co. 9. a.

As, seisin of fealty is not sufficient to have an assise for rent. 2 Rol. 463. l. 52.

So, in an assise for an office, it is not sufficient for a seisin, that he goes to the place where it ought to be exercised, and demands his station there. 2 Lev. 108.

Nor, if he recovers damages against another in an action upon the case for disturbing him in the exercise of the office. Semb. 2 Lev. 108.

So, seisin of services, by the hand of a lessee for years, is not sufficient for an assise against him in the reversion, after the years expired. 2 Rol. 465. l. 2. 1 Rol. 314. l. 45.

Or, by the hand of a tenant at will. 1 Rol. 314. l. 42.

So, seisin of rent-service is not sufficient for a rent, which becomes seck by the act of the party himself; as, if the lord grants his seignior, saving the rent, seisin of the rent before is not sufficient to have an assise of the rent, which is now seck. 4 Co. 9. b.

So, if a donor or lessor for life grants the reversion, saving the rent. Ibid.

So, if a man makes a feoffment of land upon condition, and afterwards the condition is broken, he cannot maintain an assise before entry and a new seisin obtained. 4 Co. 9. b.

### (E) What is sufficient to make a distress.

But a seisin in law is sufficient to have a distress for rent. 4 Co. 9. a.

So, it is sufficient for an avowry, &c. for rent, or other service, since the st. 32 H. 8. 2. though that statute speaks of actual possession within

forty years; for that shall be restrained to seisin for an action, and not for a distress. R. 4 Co. 10.

And seisin of homage is a sufficient seisin to enable a distress for all other services, superior or inferior. R. 4 Co. 8. b. Bevil.

So, seisin of any superior is seisin of every inferior service; as, if a man holds by *escuage* and other services, seisin of *escuage* is seisin of homage, fealty, &c. R. 4 Co. 8. b.

So, seisin of homage is seisin of fealty. 4 Co. 8. b.

And if the tenure be by fealty and rent, seisin of the rent is seisin of the fealty. Ibid.

And seisin of the fealty is seisin of the rent. R. 4 Co. 8. b.

So, acceptance by the lord from his tenant of an horse, &c. for rent due, is seisin of the rent. 1 Rol. 314. l. 25.

So, if the tenant pays an amercement for not doing suit, or makes a composition for it, it is seisin of the suit of court. 1 Rol. 314. l. 20.

So, an attornment, or recovery in avowry for any service, is a sufficient seisin of the service. 1 Rol. 314. l. 17. 27.

So, seisin of any annual service is seisin of all casual services; as, seisin of rent, suit, &c. is seisin of *escuage*, homage, fealty, ward, relief, heriot-service, service to pale in the park, or cover the hall of the lord, &c. 4 Co. 8. b.

But seisin of a superior service is not seisin of any inferior, which is not incident. Ibid.

So, seisin of any annual service is not seisin of any other annual service; as, seisin of rent is not seisin of suit, work-days, annually, &c. 4 Co. 9. a.

### (F) Disseisin.

#### (F 1.) What shall be.

[The precise definition of what constituted a disseisin, such as made the disseisor the tenant to the demandant's *precipe*, though the right owner's entry was not taken away, is not now known; but it was, some way or other, turning the tenant out of his tenure, and usurping his place and feudal relation. It was a complicated fact, and differed from dispossessing. The freeholder by disseisin differed from a possessor by wrong, or mere intruder without investiture. 1 B. M. 60.]

[Cases where the true owner thinks fit to admit himself disseised, in order to bring his assise, are very different from actual disseisins in spite of the true owner, *i. e.* from such disseisins as made the disseisor tenant to every demandant and freeholder, *de facto*, in spite of the true owner. Ibid.] (Vide Cowp. 702.)

[Disseisin at election is very different from actual disseisin, though the same term is applied to both. Ibid.]

Disseisin is the tortious ousting of seisin in lands or tenements. Co. L. 153. b.

As if a man enters into lands or tenements, where his entry is not *congeable*, and ousts another of his freehold. Lit. s. 279.

[It is not necessarily a disseisin to take the profits of an estate without right. Ld. R. 829. B.]

If he enters upon the possession of a lessee, this ousts the lessor of his freehold.

Though the lessee continues payment of his rent afterwards. Dub. 1 Rol. 658. l. ult.

So,

So, if a man disturbs the entry of him who has right, into land, it will be a disseisin. 1 Rol. 659. l. 15.

If he cuts down trees contrary to the command of him who has right.

If he comes to an house that is locked up, and takes the door in his hand, and claims it in fee; though he does not enter, it will be a disseisin of the house. R. 1 Rol. 659. l. 5.

So, if a copyholder leases by licence for years, and afterwards ousts his lessee, it will be a disseisin to the lord. 1 Rol. 662. l. 47.

So, it will be a disseisin, though made by colour of right; as, if tenant for life or years makes a feoffment, and the feoffee enters, he will be a disseisor.

So, if he makes a gift in tail, or lease for life, other than his own life, and the donee or lessee enters.

So, if lessee at will, or by sufferance, makes a lease for years, and the lessee enters. R. Cro. El. 830.

If the lessee continues in possession after a fine, or surrender to the lessor.

Or, after his term expires, after entry, or against the will of the lessor.

So, if the king's patentee enters, where the king has no right to make a grant.

If the escheator, or other officer of the king, seizes the land without use.

If a man, who has no right, obtains land out of the hands of the king upon false suggestion. 1 Rol. 658. l. 40.

If a demandant enters *pendente lite*.

Or, sues execution after his release given, after verdict, and before judgment.

Or, enters after a recovery utterly void.

If a sheriff, upon a general writ, makes execution of other land. 1 Rol. 664. l. 5.

So, if an officer executes an office, to which another has a right, by appointment of the court, he will be a disseisor.

If a woman takes dower to which she has no title, by assignment of a guardian, she will be a disseissoress.

So, if a man enters by feoffment of a guardian.

If a guardian continues possession after full age of his ward, he will be a disseisor. Co. L. 57. b. 1 Rol. 659. l. 50.

So, if a man enters by release of an infant, he will be a disseisor.

If he enters to make livery for him who has no right.

If he enters by colour of a lease from the disseisor after the entry of the disseisee. 1 Rol. 662. l. 30.

And every one will be a disseisor who is *particeps criminis*; as, if a man commands another expressly to make a disseisin. 1 Rol. 663. l. 20. 25.

If he gives assent precedent or subsequent to the disseisin.

If a lessee, guardian, tenant by *elegit*, &c. makes a feoffment, &c. he will be a disseisor, as well as the feoffee, &c. who enters.

So, if a lessee attorns, or voluntarily pays his rent to a stranger.

So, a *feme-covert*, or infant, may be a disseisor by actual entry, without her husband. 1 Rol. 660. l. 30.

Or, if they agree to a disseisin by another after the coverture determined, or at full age. 1 Rol. 660. l. 29.

So, if a man enters by a disseisin, he will be a disseisor, though he claims only for years; as, tenant by statute, in dower, &c. where they have no right to it; for they cannot qualify their wrong. 1 Rol. 662. l. 35. 40.

If one parcener enters, claiming the whole, and takes the profits of the whole, it will be a disseisin of his partner. Co. L. 373. b. 243. b. Vide Parcener, (A 3.)

What shall be a disseisin of a rent, vide Rent, (D 2.)

(F 2.) What not,

But an act, which does not oust him who has the freehold, though it be tortious, will not be a disseisin; as, if a commoner commands the owner of the soil not to cut down trees, whereupon he desists, and goes off out of the land, it is no disseisin: for he who has right shall not be ousted of his seisin by *parol*. 1 Rol. 659. l. 10.

So, if A. enters upon the possession of B. but does not expel him, it is no disseisin. 1 Sal. 246. Co. L. 181. a.

So, if a man makes a lease, off the land, to him who has the possession, and rent be paid to him, it will not be a disseisin without more. 1 Rol. 659. l. 40. 45. Vide *infra*.

So, if a man erects a shop in a vacant place of the king's manor, without paying rent, it will not be disseisin; for the king cannot be ousted of his seisin. 1 Rol. 659. l. 25.

Though he continues in the shop after a grant of the manor by the king to another in fee; for the first being no disseisin, the continuance of the same act will not be so. R. 1 Rol. 659. l. 25.

So, if a man enters upon the land of A. in ward of the king, and takes the profits as owner, and continues the possession after livery sued by A. it will not be a disseisin, when the first act was not so. R. 1 Rol. 654. l. 30.

So, if tenant *in capite* devises all his land, which is void for a third part, and the devisee enters, and makes a lease of the whole, it will not be a disseisin; for he was tenant in common with the heir, and tenant in common cannot be ousted without actual ejectment. R. 1 Rol. 658. l. 45. Mo. 546.

So, though the devisee levy a fine of the whole. 1 Rol. 658. l. 50.

So, a disseisin of part of a manor, rent, &c. if there can be a severance, will not be a disseisin of the whole. 1 Rol. 664. l. 21.

So, it will not be a disseisin, where a man enters by sufferance of the owner. 1 Rol. 659. l. 20. R. 1 And. 134.

So, if a lessee continues in possession after his term, without other act; for he is only tenant by sufferance. 1 Rol. 659. l. ult.

[To make a title by disseisin, there must be a wrongful entry; a wrongful continuance of possession after a rightful entry, is not a disseisin. So that a fine with proclamations levied by one after the death of a tenant for life under whom he held, operates nothing against the remainder-man, who therefore may bring ejectment without having first entered; for a fine levied by one who has not a freehold by right or by wrong, is a nullity. So likewise, if he die after five years continuance of possession, and his heir enter, this is not a descent cast, and therefore does not toll the entry or ejectment of the remainder-man, for to make a descent cast, the party must have had a descendable estate. 3 M. & S. 271.]

So,

So, if a stranger makes a lease by indenture to tenant by sufferance, without ousting the possession, it will not be a disseisin, though tenant by sufferance pays him the rent upon the lease. R. 1 Rol. 659. l. 40.

So, if guardian by nurture makes a lease to any one in possession under the title of the infant, rendering rent to himself, which is paid accordingly, it will not be a disseisin. 1 Rol. 659. l. 45.

So, if a man enters, claiming only a lawful estate, he will not be a disseisor, though he has no right to it; as, if a man makes a lease to B. and his heirs for years, and the heir enters, claiming the term which does not belong to him. 1 Rol. 662. l. 45.

If a devise be void for a third part, and the devisee enters, claiming the whole by the devise. R. Cro. El. 641.

So, if a sheriff, &c. does execution pursuant to his authority, he will not be a disseisor, though the judgment or process was erroneous. R. 1 Rol. 664. l. 5.

As, if the sheriff makes restitution after a reversal in error, without a *scire facias* against the terre-tenants who were not parties to the record, as they ought to be. R. 1 Rol. 663. l. 50.

[Where an ejectment is brought, there can be no disseisin. 1 B. M. 60.]

[Taking possession under a judgment in ejectment is not a disseisin of the freehold; nor can the true owner elect to make it so. For the entry is under authority, and lawful, therefore not liable to be punished by fine; nor can the true owner enter upon such recoveror as a disseisor. Ibid. Cowp. 701.]

[Possession under a judgment in ejectment can never amount to a disseisin of the freehold. Cowp. 689.]

[A fine levied by tenant for life who continues in possession, is no disseisin of the remainder-man. 12 East, 141.]

[An entry and possession of the devisee of tenant for life, who had levied a fine, and afterwards continued in possession till her death, is no disseisin of the remainder-man. 12 East, 141.]

### (F 3.) What shall be so, or not, at election.

So, if a lessee at will, or by sufferance, makes a lease, it will not be a disseisin but at the election of the lessor. R. 1 Rol. 661. l. 25. Cro. Car. 302. Jon. 316. Vide estates, (H 1, 2.)

So, if a man enters by colour of a lease, which is void, and pays rent to the lessor, he will not be a disseisor, but at the election of the lessor. R. 1 Rol. 661. l. 45.

Though he claims a lease for life, as well as where he claims by a lease for years or at will. R. cont. 1 Rol. 662. l. 10. Vide estates, (H 1, 2.)

So, if A. makes a lease for years, and afterwards makes a jointure, and aliens the fee to B. who enters, and takes the rent of the lessee, and then the wife enters, claiming her jointure, and takes the rent, it will be a disseisin, or not, at the election of B. 1 Rol. 662. l. 15.

So, if a lessee attorns, or pays his rent to a stranger without coercion, without more, it will not be a disseisin, but at the election of the lessor. 1 Rol. 659. l. 17.

So, if a man enters, claiming as guardian, when he has no right to be so, it will not be a disseisin, but at the election of the heir. 1 Rol. 661. l. 20.

If he enters upon the land of an infant by his assent, for his assent is void. 1 Rol. 661. l. 40.

(F 4.)

## (F 4.) Who shall not be a disseisor.

So, the king or queen cannot be a disseisor.

So, a feme-covert shall not be a disseisress by the act of her husband, or a stranger. 1 Rol. 660. l. 5. 10.

Though she agrees to it during the coverture; for her agreement is void. 1 Rol. 660. l. 15. 20.

So, an infant cannot be a disseisor by the act of a stranger, though he agrees to it during his nonage. 1 Rol. 660. l. 25. 35.

Though the feme-covert or infant be present, when the husband or stranger enters, without more. 1 Rol. 660. l. 37. 661. l. 12.

So, a feme-covert by actual entry cannot make a disseisin to the use of her husband, or a stranger. 1 Rol. 660. l. 50.

So, a corporation cannot make a disseisin in their corporate capacity; for the person who does the act is the disseisor in his natural capacity. 1 Rol. 661. l. 5.

So, if a man commands A. to enter into land when he has no right, and A. enters accordingly, A. alone will be the disseisor, and not he who gave the command. 1 Rol. 663. l. 10. 15.

If a man leases the land of another for years off the land, and the lessee enters, the lessee alone will be the disseisor. 1 Rol. 663. l. 27.

But if a lessee at will or by sufferance makes a lease for years, the lessor only will be the disseisor. R. 1 Rol. 663. l. 30. 40.

[He who enters under a void lease, is not a disseisor but tenant at will. 1 Wils. 176.]

Vide more concerning Seisin, in Pleader, (C 33. — E 22.)

**Primer seisin.**

Vide PRÆROGATIVE, (D 59.)

**SEISURE.**

Vide COPYHOLD, (H 7. — K 20, 21. 25.) — PRÆROGATIVE, (D 68.)

**— of arms.**

Vide JUSTICES of the PEACE, (B. 12.)

**— of felons' goods.**

Vide FORFEITURE, (B 4. 7. 8.) — JUSTICES, (Z). — PLEADER, (2 S 18.)

**— of forfeited, goods.**

Vide TRADE, (C 6.)

**— of temporalities.**

Vide PRÆROGATIVE, (D 23, &c.)

**SEMINARY.**

Vide POPEERY, (B 6.)

**SEQUESTRATION.**

Vide CHANCERY, (D 7.)

**SEREMENT.**

SEREMENT.

(A) When an oath shall be required. *infra*.

(A 2.) How an oath shall be taken. *infra*.

(B) When not. p. 332.

(C) When required of a peer. p. 333.

[ (D) By whom an affidavit shall be made.] p. 333.

[ (E) Before whom sworn.] p. 333.

[ (F) When made.] p. 333.

[ (G) Subject matter of.] p. 334.

[ (H) Form of.] p. 334.

[ (I) Test of its sufficiency.] p. 335.

[ (K) Conclusiveness of.] p. 335.

[ (L) Objections to, how taken.] p. 335.

[ (M) Filing of.] p. 335.

[ (N) Proof of.] p. 335.

[ (O) For a distringas.] p. 335.

[ (P) Before a commissioner.] p. 335.

[ (Q) Unlawful oaths.] p. 336.

(A) When an oath shall be required.

No oath can be required, unless it be established by act of parliament, or by common law. 2 Inst. 479.

The oaths of judges, counsellors, sheriffs, under-sheriffs, escheators, attornies, mayors, and bailiffs, are established by act of parliament. 2 Inst. 479.

When the oath of allegiance shall be required. Vide Allegiance, (B 1, &c.)

[ (A 2.) How an oath shall be taken.]

[On the principles of the common law, no particular form of oath is essential to be taken by a witness. Cowp. 389.]

[Therefore Jews, before their expulsion in the 18th of Ed. 1., were permitted at common law, and are still permitted to be sworn on the Old Testament. Id. *ibid*.]

[Turks may be sworn on the Alcoran. Id. *ibid*.]

[And Gentoos, according to the ceremonies of their own religion. Vide 1 Atk. 25.]

[The testimony of a sectary, who refused to kiss the book, but whose form of swearing was by opening the book, and lifting up his right hand, has been admitted in a civil action. 2 Sid. 6.]

(B) When

(B) *When not.*

But a new oath, not established by the common law or authority of parliament, cannot be imposed upon a judge, commissioner, or other subject. 2 Inst. 479.

Though allowed by the king's patent. Semb. per Cooke, 1 Rol. 5.

But an addition to an oath, which is for the public good and due execution of his office, may be made by order of the king and the state without parliament. Semb. Cro. Car. 26.

And therefore, by the common law, *juramentum calumnie in causis ecclesiasticis* could not be required of laymen, except in *causis matrimonial. et testament.* 2 Inst. 657.

Though allowed by the constitution of Otho, 21 H. 3. A. 1236; for a canon contrary to a statute or the custom of the realm has no force. 2 Inst. 658.

Though it seems to be warranted by the st. 2 H. 4. 15. for that was repealed by the st. 25 H. 8. 14. and 1 Ed. 6. 12. and though revived by the st. 1 & 2. Ph. & M. 6. was afterwards repealed by the st. 1 El. 1. and continues repealed. 2 Inst. 658.

But it might be demanded of the clergy. 2 Inst. 657.

And of a layman in a matrimonial or testamentary cause; for in these cases the transaction is often in private. 2 Inst. 657.

So, no person, ecclesiastical or temporal, shall be examined upon oath in an ecclesiastical court of his thoughts. 2 Inst. 658. Vide Prohibition, (G 13.)

By the st. 13 Car. 2. 12. no ecclesiastical judge may tender an oath *ex officio*, or any oath whereby any person may be charged to accuse, purge himself of, or confess any criminal matter, that may subject him to censure or punishment.

And therefore no one can be bound by the spiritual court to take an oath to present or accuse himself. Hard. 364.

Nor, to make oath, that he will present upon such articles *inter alia.* Ibid.

Nor, to take an oath, except in a matter proper for the jurisdiction of the spiritual court, as *in causa matrimonial. vel testamentar.* Hard. 364. 2 Inst. 657. 1 Rol. 220. 2 Bul. 182. Vide Prohibition, (G 4.)

Nor, to answer upon a matter within their jurisdiction upon oath, before it be presented by two at least. R. Cro. El. 262.

Nor, to answer upon a matter which subjects him to a penal law, though the jurisdiction of the spiritual court be saved; as, if he takes usury, hears mass, &c. 2 Inst. 657. 2 Rol. 305. l. 15. 25. 2 Cro. 388. 1 Rol. 220. 2 Bul. 183.

Nor, to give an account of his faith. 2 Rol. 305. l. 35.

Nor, to answer to an accusation of incontinency, &c. R. Cro. El. 201.

Or, of covin or fraud in a lease for years. R. Hob. 84.

Nor, to answer to a matter, which, being proved, will be a forfeiture of his freehold. R. Sal. 550.

Or, a forfeiture of his bond. R. 1 Rol. 110.

[The suppletory oath may be tendered to the party by the judge in the ecclesiastical courts, on a *sempierna probatio in causa matrimonial.* Str. 80.]

[The exercise of it lies in *arbitrio judicis.* Ibid.]

So,

So, an oath established by a canon to make no alteration in the government of the church by archbishops, bishops, deans, archdeacons, &c. is not legal. 3 Rush. 1186. 1205.

Nor an oath established by a bye-law of the dean and chapter, who have power to make bye-laws, before an archdeacon shall be admitted to his office. R. 2 Mod. Ca. 27.

So, the secondary of the king's bench cannot examine upon oath, but the examination shall be in the crown-office. 2 Rol. 499.

[An affidavit cannot be taken by a commissioner who is the party's attorney, or his menial servant, or his agent in that cause: but if only agent in another, he may. Barnes, 45.]

### (C) *When required of a peer.*

So, all lords of parliament in the trial of causes before them shall not take any oath. Seld. vol. 3. p. 2. 1533.

So, by the ancient law, when they answer as defendants in any court, the answer shall be upon protestation of their honour, without oath. Cont. per Just.; but it was R. acc. in Parliament, 2 Cor. Jon. 154. Per Harcourt, Sal. 513. Seld. vol. 3. p. 2. 1335.

Though the answer be to a charge against him; as, in the Star-chamber, &c. R. cont. Hut. 87.

But a peer made chancellor, treasurer, justice of the peace, or other officer, shall take the usual oath of office. R. Jon. 152.

So, he shall take the oath of homage. Jon. 152.

So, if he wage his law it shall be upon oath. Jon. 153.

So, if he be a witness. Jon. 153. Sal. 513. Semb. cont. Seld. vol. 3. p. 2. 1535. R. acc. 2 Mod. 99. Acc. Dy. 314. b. in marg.

Or, make an affidavit. Sal. 513.

Or, be examined upon interrogatories. R. per Harcourt, Sal. 513.

And when sworn, a peer puts his hand upon the gospels, as others do. Dy. 314. b. in marg.

### [(D) *By whom an affidavit shall be made.*]

[Either the suitor, his attorney, or the attorney's managing clerk, may make an affidavit of merits. 2 Smith, 61. But none others; and if by either of the latter, they must swear that they are such. 3 Taunt. 403.]

### [(E) *Before whom sworn.*]

[An affidavit to ground a motion for a rule *nisi* cannot be sworn before the attorney for the party, or his partner. And a rule obtained upon such an affidavit will be discharged with costs. 1 Price, 116.]

[An affidavit for an attachment cannot be sworn before the attorney of the party applying for it. 3 T. R. 403.]

[The rule of court E. 15 Geo. 2. prohibiting the attorney who is concerned in the particular cause taking affidavits in that cause, does not extend to his clerk. 8 T. R. 638.]

[Where the agent is the attorney on record, affidavits may be sworn before the principal attorney. 5 Taunt. 89.]

### [(F) *When made.*]

[It seems that an affidavit may be made at any time; thus, before the proceeding after which it is to be used has terminated. Therefore an affidavit

affidavit in support of an application to take out execution, notwithstanding a writ of error brought, sworn before judgment was signed, was held regular. 4 M. & S. 331.]

[An affidavit made after a rule to show cause granted is not admissible. 3 Price, 257.]

### [(G) Subject matter of.]

[On a rule *nisi* coming on an affidavit of facts in support of the rule, which were not disclosed on the original application, is inadmissible. 3 T. R. 310.]

### [(H) Form of.]

[The reason why affidavits not entitled when necessary cannot be read is, because, if false, the party could not be indicted for perjury. 3 T. R. 601.]

[An affidavit to obtain a rule *nisi* must be entitled in court. 1 B. & P. 271.]

[As well the christian as the surnames of the parties must be prefixed to affidavits showing cause; that in case of an indictment thereon, it may appear from the affidavits themselves, without the aid of *extrinsic averment* that they were filed in such cause. 7 T. R. 661. 2 East, 182.]

[All affidavits in a cause, excepting affidavits of the cause of action before process is sued out, must be entitled with the names of all the parties, both plaintiffs and defendants, and with their christian as well as surnames. 1 Smith, 457.]

[In a cause commenced against two, where the process is not bailable, an affidavit made by one defendant before declaration may be entitled in a cause of A. against B. who is sued together with C. 6 Taunt. 286.]

[Until a rule for a criminal information is made absolute, the affidavits need not be entitled in any cause. 6 T. R. 60.]

[A note to pay a prisoner his sixpences, was written upon the same paper with an affidavit to verify the plaintiff's hand-writing thereto; held that the affidavit not being duly entered in the cause, although the note was so, could not be aided by references, and could not be read. 2 Smith, 293.]

[In a suit by the assignee of a bail bond, an affidavit for a rule *nisi*, in which the plaintiff was styled, "assignee" only, was held bad. 3 Taunt. 377.]

[An affidavit made a defendant which styles him defendant in the cause, and states his abode, suffices without the addition of his degree. 6 Taunt. 73.]

[A deponent having left one residence for another, cannot describe himself as late of the former. 11 East, 528.]

[One discharged from prison, but who continues to sleep there at night, having no other residence, may describe himself as late of the prison. 11 East, 528.]

[The rule of K. B. Mich. 15 Car. 2., requires that "the true place of abode of every person who shall make affidavit in court, be inserted in such affidavit." If a deponent gives himself the same addition, as would be good in an indictment against him for perjury, the rule is satisfied. Therefore an affidavit to hold to bail, describing the deponent as "of the city of London," is sufficient. 3 M. & S. 165.]

[Rule as to naming deponents in the jurat of an affidavit. K. B. Mich. 37. Geo. 3. 7 T. R. 82.]

[In affidavits to be read, sworn by two or more deponents, it must appear in the jurat that all have been sworn. 1 Price, 338.]

[It is sufficient, that affidavits appear expressly by the jurat to have been sworn by all the deponents; and it is not necessary that they should be severally named in the jurat as having been sworn, as is required in the King's Bench. 2 Price, 1. Vide *Infra*, 12. as to naming the place whereat, &c.]

[An affidavit ungrammatically expressed, is sufficient, if the meaning is apparent. Lofft. 275.]

### [(I) Test of its sufficiency.]

[The test to try the sufficiency, in certain points, of an affidavit, is to consider whether perjury may be assigned upon it. 4 M. & S. 332.]

### [(K) Conclusiveness of.]

[If necessary it may be shewn that an affidavit was sworn at a different place to that expressed in the jurat. 9 East. 437.]

### [(L) Objections to, how taken.]

[Where an affidavit has been sworn before the plaintiff's solicitor, it is necessary to have an affidavit of that fact, the court will not reject it, merely because it appears upon the face of it, to have been sworn before a person of the same name as the plaintiff's attorney. Wigher, 62.]

### [(M) Filing of.]

[If a motion cannot be entertained, the affidavit upon which it is founded cannot be filed; the accessory must follow the fate of its principal. 3 M. & S. 9.]

[After an affidavit has been read and filed, it cannot be taken off the file, in order that it may be returned to the deponent. 2 Wils. 371.]

### [(N) Proof of.]

[Proof of an affidavit made in another cause, and an office copy is sufficient. Forrest, 153.]

### [(O) For a distringas.]

[The belief that defendant absconds to avoid process, is an essential term in an affidavit for a *distringas*. 4 Taunt. 156; as are likewise the grounds of that belief. 1 Mars. 267. 5 Taunt. 520. 853.]

[And it must set out the tenor of the English notice in *hæc verba*. 4 Taunt. 619. 5 Taunt. 853.]

### [(P) Before a commissioner.]

[An affidavit dated and sworn before a commissioner of the K. B. must show in the jurat, the place where it was sworn, or it will be insufficient. The reason is, that it may appear to be such an affidavit, upon which perjury may be assigned. If a place be named, a medium is afforded to the court of referring to their records, and seeing that the party

party taking the affidavit is a commissioner. If a place be not named, *non constat*, but that the affidavit was taken at sea. 3 M. & S. 498.]

[An affidavit (for a *mandamus, c. gr.*) sworn before a commissioner, must either describe him as a commissioner of the court of K. B. or be entitled in the K. B. 13 East, 189.]

[Rule relative to affidavits sworn by persons apparently illiterate before a commissioner of the court K. B. East, 31 Geo. 3. 4 T. R. 284.]

### [(Q) Unlawful oaths.]

[In an indictment on 37 Geo. 3. c. 123. it is sufficient to allege and prove what the object of the oath and engagement was, without stating its tenor or purport. 6 East, 419.]

[Parol evidence may be given of the oath, without notice to produce the paper from which it was supposed the defendant read it. 6 East, 421.]

[Declarations made at the time by the party administering the oath, are evidence to explain the real design of it. 6 East, 421.]

[The stat. 37 Geo. 3. c. 123, against unlawful oaths, is not limited to those administered for the purposes of mutiny and sedition, but extends to all cases of illegal combination. - 3 East, 157.]

Perjury, how punished, vide Justices of Peace, (B 104, &c.)

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## SERJEANT AT ARMS.

Vide CHANCERY, (D 6.)

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## SERJEANT AT LAW.

Vide LEY, (D 2, 3.)

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## SERJEANTY.

Vide HOMAGE, (F.)

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## SERVANTS.

Vide JUSTICES OF THE PEACE, (B 58, &c.)

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## SERVICES.

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How a seignior shall be created by reservation of services, vide Seignior, (A). — Honour.

Vide more concerning services, in Copyhold, (K 8. — M 4.) — Pleader, (3 K 15.) — Suspension (A).

### The king's service.

Vide WAR, (B 1, &c.)

**Knight's**

**Knight's service.**

Vide HOMAGE, (G 1, &c.)

**Writ of services.**

Vide DROIT, (G).

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**SESSIONS.**

Vide ASSISE, (B 23.)—JUSTICES OF THE PEACE, (D 1, &c.)

**Sessions of parliament.**

Vide PARLIAMENT, (Q).

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**SETTLEMENT.**

**Marriage-settlement.**

Vide CHANCERY, (3 M 3, 5.)—(3 Z 1, &c.)

**Voluntary settlement.**

Vide CHANCERY, (3 M 5.—4 H 9.—4 O 7.)

**Settlement of the poor.**

Vide JUSTICES OF THE PEACE, (B 71, &c.)

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**SETTLED USE.**

Vide USES, (K 5.)

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**[SETT-OFF.]**

[Vide ACTION OF ASSUMPSIT.]

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**SEVERANCE.**

Vide ASSISE, (B 10.)—COPYHOLD, (Q 4.)—ESTATES, (K 5.)

**Severance of tythes.**

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**SEWERS.**

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**[(K) Pleading.] p. 352.****(A) Commission of sewers.**

By the common law the king might make a commission for the survey and repair of the banks, walls, and other fences against the sea, before any statute of sewers. 10 Co. 141. F. N. B. 113.

But by the st. 6 H. 6. 5. it was first enacted, that commissions of sewers be granted; and it prescribes their form.

And now by the st. 23 H. 8. 5. commissions of sewers shall be directed in all parts in the realm, when and where need shall require, according to the tenor there ensuing.

(B) To

## (B) To whom granted.

By the st. 23 H. 8. 5. the commission of sewers shall be directed to such substantial and indifferent persons as shall be named by the lord chancellor, lord treasurer, and two chief justices, or any three of them, whereof the chancellor to be one.

And by the same statute, every person named a commissioner shall attend the execution of the said commission.

And before he acts shall take an oath before the lord chancellor, or such to whom a *dedimus potestatem* is by him directed to take the same, or before the justices of peace at the quarter sessions from the same county, truly to execute the authority, &c.

And if any one sits as a commissioner before he is sworn, he forfeits 40*l.* for every time; a moiety to the king, a moiety to him that shall sue, &c.

And by the st. 25 H. 8. 10. any commissioner refusing to be sworn, the refusal being returned into chancery on the king's writ, shall forfeit five marks for every such contempt, unless he shew reasonable cause to the chancellor for such refusal.

But by the st. 23 H. 8. 5. none shall sit as a commissioner, not having lands, tenements, or hereditaments in fee, in tail, or for life, of forty marks *per annum*, above all charges, to his own use, except he be resident in and free of some city, borough, and town-corporate, and have moveable substance of 100*l.* value, or be an utter barrister at law, on pain of 40*l.*; a moiety to the king, a moiety to the informer.

By the st. 25 H. 8. 10. none shall be bound to act in the commission, unless he be dwelling in the same county.

By the st. 13 El. 9. no farmer for years of lands within the limits of the commission shall intermeddle in the execution of the commission, unless he have 40*l.* *per annum* freehold, and then only as to such lands which he holds not as farmer.

And therefore, if a man be entitled to a reversion, or remainder after an estate for life, of the annual value of forty marks, he cannot be a commissioner, for he has not an estate *in presenti*. Cal. 194.

So, if he be seised of franchises or liberties, if they are not demised, for the annual rent of forty marks; for though they are hereditaments, they are not of an annual value. Ibid.

Or, if he be seised of casual services; as, homage, heriot, relief, &c. Ibid.

Or, if he be seised of an advowson; for it is of no value. Ibid.

So, joint-tenants, or tenants in common, or parceners of lands of forty marks *per annum*, cannot be commissioners; for though they are seised *per my et per tout*, yet each has only a moiety. Cal. 125.

So, a man seised in right of his wife cannot be a commissioner. Ibid.

Nor, a man seised in trust for another. Ibid.

Nor, a dean and chapter, mayor and commonalty, or other corporation aggregate seised *jure incorporationis*. Cal. 198.

So an alien cannot be a commissioner. Cal. 196.

Nor, a lessee for years of a farm, unless he has also a freehold of 40*l.* *per annum*. Cal. 197.

So, a disseisee before entry cannot be a commissioner. Cal. 198.

Nor, a bargainee of lands before enrolment, though the deed be afterwards inrolled. Cal. 198.

So, a freeman of a corporation cannot be a commissioner, unless he be also resident within the borough, and have 100*l.* personal estate. Cal. 191, 192.

If he be not actually admitted to his freedom. Cal. 190.

And residency in law is not sufficient, unless he be actually resident within the borough. Cal. 291.

Though he inhabit within the walls, if he be not also within the precinct and liberty of the borough. Cal. 192.

So, if a freeman has no personal estate in possession, it is not sufficient, though he has debts upon statute, judgment, bond, or contract, to the value of 100*l.* Ibid.

So, if he has it not in his own right, though he is possessed of it in right of his church, or as a member of a corporation, &c. Cal. 193.

Or, as lessee for years upon a demise. Cal. 196.

Yet, an utter barrister may be a commissioner, though he has not any lands. Cal. 198.

So, a man may be a commissioner having forty marks *per annum*, though he be a villein. Cal. 196.

Or, be an infant. Cal. 202.

So, a woman may. Ibid.

So, a man who has lands in respect of his office; as, the warden of the Fleet, &c. seised for life of an office, to which forty marks *per annum* belong. Cal. 196.

So, a bishop, parson, &c. seised in right of his church. Cal. 196.

So, it is sufficient if he have lands of forty marks, when he acts as a commissioner, though he had not when the commission was granted. Cal. 198.

Or, though he afterwards sell them. Ibid.

So, if a freeman has 100*l.* personal estate, it is sufficient in whatever place it lies. Cal. 193.

Or, by whatever means he obtained it. Cal. 193, &c.

But if a person not qualified act as a commissioner, he will be subject to the penalty; but his acts and decrees remain good. Cal. 203.

### (C) Authority of the commissioners.

#### (C 1.) To what things it extends.

By the st. 23 H. 8. 5. commissioners of sewers shall be directed in all parts within this realm, &c.

And therefore all the English sea, being *infra regnum Angliæ*, may be within the jurisdiction and extent of the commission of sewers. Cal. 18.

So, the Isle of Man, the Isle of Wight, Wales, and other antient or new islands within the kingdom of England. Cal. 20.

So, lands deserted by the sea. Cal. 22.

The shores and coasts of the sea. Cal. 30. 32.

The arms of the sea, creeks, havens, and ports. Cal. 33.

But the authority of the commissioners does not extend beyond the limits of their particular commission. Cal. 36.

So,

So, land deserted by or gained from the sea after the commission granted cannot be within the jurisdiction of the same commission. Cal. 38.

So, the sea, or creeks and bays of the sea, are not with the management of the commission. Cal. 38.

So, lands deserted, before they are got to be profitable, are not within the defence of the commission. Cal. 38.

And therefore the commissioners may build a wall, bank, &c. for the advantage of the other country, but not for the defence of the lands deserted, till they are profitable. Cal. 38.

[The commission of sewers extends only to navigable streams, unless within two miles of London. Vide st. 3 Jac. 1. c. 14. & 2 Bl. R. 717.]

[Yet if the sewer communicate with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised be likely to be benefited, or be so in fact, the commissioners have jurisdiction. 2 T. R. 358.]

(C 2.) What defences they may make.

By a commission founded upon the st. 23 H. 8. 5. it is recited, "that forasmuch as the walls, banks, gutters, sewers, gates, calcyes, bridges, streams, and other defences by the sea-coast and marsh ground within the limits of A., &c. or the confines of the same, by the rage of sea or by means of trenches of fresh water, having course to the sea, be so lacerate, &c. we therefore have assigned you or six of you (three quorum) to survey the said walls, &c. and the same cause to be made, corrected, repaired, amended, put down, or reformed, as the case shall require," &c. 10 Co. 143. a.

And therefore the commissioners have authority for repairing the walls and banks of the sea. Cal. 37, 38.

And also the banks and walls of navigable and other rivers which have a course to the sea. Cal. 52.

So, they may reform such walls and banks, if necessary. Cal. 51, &c.

So, the commissioners have power of rivers, gutters, ditches, ponds, pools, sewers, and streams. Cal. 57, &c.

So, if a navigable river becomes dry, they may for the benefit of the navigation, supply it with water from another river, which has a superfluity. Cal. 62.

Though the navigation be only for private boats for carriage of the goods of others; for that is a common benefit. Cal. 62.

So, the commissioners have power of all bridges which stand upon lands surrounded. Cal. 63.

So, the commissioners may make *de novo* the antient walls, rivers, &c. where they are decayed or totally perished. 10 Co. 141, 142.

So, when they make a new wall, &c. they may make any little alteration for the good of the public; as, if a wall, &c. must of necessity be rebuilt, they may make it in a place more commodious for the level; for it is not a new invention, but an improvement of the ancient means for preservation of the level. 10 Co. 142. b.

But banks, walls, &c. for fences of private grounds, are not within the power of the commissioners. Cal. 54.

Though they are made to ditches, gutters, or streams for watering or draining their private soil. Cal. 54.

Or, for inning and securing of private marshes. Ibid.

So, conduits, &c. for private use or convenience, are not within their power. Cal. 60.

So, if the town of B. be destitute of water for cattle, &c. and the town of C. abounds, the commissioners cannot make an order for the relief of B. Cal. 61.

So, they cannot make an order for conveying a river or other stream (as the cut from Ware to London, &c.) to any town or city for household affairs; for they have no power but for draining and navigation. Cal. 62.

Nor, for navigation of private boats for a man's private use. Ibid.

So, it is not within the power of the commissioners to make new works, where there was nothing of that nature before; as, to make a new cut from one part of an old river for seven miles to another. R. 10 Co. 141, 142.

Nor, new drains, banks, or sluices. R. Mo. 825.

So, they ought not to make an antient wall, &c. *de novo*, if by a reparation the peril can be avoided. 10 Co. 142. b.

### (C 3.) What annoyances they may reform.

So, by commission founded upon the 23 H. 8. 5. the commissioners have authority not only to survey walls, &c. but because the common passage of ships, boats, &c. in rivers, &c. by means of setting up and making streams, mills, mill-dams, bridges, ponds, fish-garths, locks, wears, flood-gates, and other like annoyances, be interrupted, &c. the commissioners may cause the same to be made, corrected, amended, put down, or reformed, as the case shall require, after their discretions. 10 Co. 143. a.

And therefore commissioners of sewers may throw down or reform all annoyances of late times erected to the prejudice of the public good. Cal. 54.

But the commissioners cannot pull down or reform any impediments, &c. but according to power to them given by some statute. R. 10 Co. 138.

And therefore they cannot remove, &c. any mill, cawsey, &c. erected before the time of Ed. 1. if it be not afterwards enlarged. Ibid.

Or, if it be afterwards enlarged, they cannot throw it down; but only reform the enlargement. R. 10 Co. 138. b.

### (C 4.) What they may do by survey.

By commission upon the 23 H. 8. 5. the commissioners may survey walls, streams, ditches, banks, gutters, calceys, sewers, bridges, mills, &c. and other impediments and annoyances aforesaid.

And by such survey they may inform themselves what defences want repair, or not. Cal. 81.

What annoyances there are. Cal. 82.

In what particular the defect consists. Cal. 81.

What materials or money ought to be provided for such defects. Cal. 81.

So, by a survey they may determine, whether a new sluice, sewer, or other defence is necessary, and in what place. Cal. 82.

So,

So, they may direct the repair of a defence, which by survey appears necessary. Cal. 82.

Or, the removal of a thing which upon a survey appears to be an annoyance. Ibid.

(C 5.) What by jury.

So, by commission upon the st. 23 H. 8. 5. commissioners are assigned to survey, &c. and also to enquire by the oaths of lawful men of the shire or place where such defaults or annoyances be, through whose default the same have happened, who holds any lands, tenements, common, &c. or may have hurt, &c. by the said walls, ditches, sewers, &c.

And therefore the commissioners ought to inquire by a jury, by whom any annoyances are erected; and they cannot determine by survey or otherwise, without inquest. Cal. 82.

By whose default a wall, bank, &c. or other defence, is defective. Cal. 83.

Who are liable to repair by prescription, tenure, &c. Cal. 88.

What lands lie within danger, &c. and who is the owner. Ibid.

(C 6.) Jury, &c. how summoned.

By commission the commissioners are authorised to make and direct all writs, precepts, warrants, &c. to all sheriffs, bailiffs, officers, and other persons within liberties, or without, &c.

And the sheriff is commanded to cause to come before them, &c. at the days and places they appoint, as many honest men of the bailiwick, &c. to inquire of the premises.

(D) Commissioners have a court of record;—In what cases they have jurisdiction.

Commissioners of sewers are justices, and have a court of record. Cal. 128.

By the st. 23 H. 8. 5. the commissioners may hear and determine all matters within their commission, at the suit of the king, or of any other complaining before them, after the laws and customs of Romney Marsh, and after their discretions. Vide post, (H 1.)

And therefore any person may prefer his bill of complaint before commissioners of sewers for a matter within the authority of the commission. Cal. 129. 173.

So, if the goods of B. are taken upon a distress against A., though it be tortious, and without authority of the commission, yet B. may have redress and his damages upon complaint before the commissioners. Cal. 773.

So, if an officer for a distress takes more than he ought, the commissioners will oblige him to return the overplus. Cal. 174.

Or, if the distress upon a town be levied upon one person they shall make the others contributory. Ibid.

If an officer buys timber, &c. for the repair of a wall, &c. the vendor shall have a remedy before the commissioners. Cal. 175.

Or, if he makes a trench, &c. by order of the commissioners upon the land of another. Ibid.

So, labourers, &c. may here recover their wages, &c. Cal. 175.

But for a collateral matter they have not authority: as, if A. be dis-  
seised of lands within the level, chargeable to the repair, &c. the com-  
missioners cannot give relief. Cal. 174.

Or, if a wall, which A. ought to repair, be thrown down, whereby  
the lands of B. are surrounded, the commissioners cannot give B.  
damages for it. Ibid.

### (E) When commissioners may make a tax.

#### (E 1.) For what causes.

By commission, the commissioners may reform, repair, &c. walls,  
ditches, gutters, sewers, &c. in all places needful; and if need be,  
make new, and cleanse, &c. the trenches, sewers, &c.; and amend,  
prostrate, &c. all mills, streams, &c. and other annoyances, &c.; and  
hear the accounts of collectors, &c. for receipt and laying out money  
levied and paid in or about making, repairing, reforming, &c. walls,  
ditches, &c. and other annoyances.

And also may take as many carts, horses, &c. and as many workmen,  
&c. as for such reparations, &c. shall suffice, paying for the same com-  
petent wages, salary, &c.

And also take as many trees, woods, timber, &c. as for the said works,  
&c. shall be sufficient, at a reasonable price, &c.

So, by the st. 23 H. 8. 5. the commissioners may every one have 4s.  
*per diem* for every day they take pains in the execution of their commis-  
sion, and one clerk 2s. *per diem* out of the rates, taxes, &c. assessed by  
authority of the said commission.

And they may assign of the same rates, taxes, &c. to the clerk for  
writing books and process in the premises, and to collectors, expendi-  
tors, and others, who shall take pains in execution of the commission,  
as they shall think reasonable.

#### (E 2.) How assessed.

By commission upon the st. 23 H. 8. 5. the commissioners are au-  
thorised to inquire, &c. and all those (viz. who have or may have hurt  
or loss, &c.) to tax, assess, charge, &c. after the quantity of their lands,  
tenements, rents by the number of acres, &c. after the rate of every  
man's portion, profit, &c. by such ways and means, &c. as shall seem  
most convenient for redress of the premises.

And upon this the regular course is, that the jury present the parti-  
cular quantity of land, or other profit, that every one who may have  
benefit by the repair, or prejudice by the non-repair, has within the  
level, and thereupon the commissioners make a decree for the assess-  
ment of every person in proportion. Cal. 82. 10 Co. 143. a.

[The commissioners of sewers under 23 H. 8. c. 5. must present the  
lands of levels, &c. to be benefited by sea-walls, &c. by jurors sum-  
moned upon a precept directed to the sheriff, and by him summoned  
from the body of the county. The jury must be sworn in court, and  
present upon the testimony of witnesses. 3 Smith, 105. 7 East, 71.]

And it is sufficient to charge the visible owner or occupier; for if he  
is not liable for the whole, he may be remedied, by application to the  
commissioners. Cal. 111.

So,

So, also the assessment may be charged in general upon such a town, who may afterwards apportion it among themselves. Cal. 96, 97.

Or, the commissioners may afterwards make a decree for apportioning it. Cal. 96, 97.

[An order to levy nine-pence per acre to be paid to the clerk, to be applied towards defraying charges in and about the execution of the commission is good. Str. 1127.]

But an assessment upon a town in general, if it be not afterwards apportioned is not good. R. 10 Co. 143. a. R. 2 Cro. 336. 2 Bul. 197. R. Mo. 825.

Nor, an assessment upon all the lands between such a place and such a place; for it must be upon each part in several. R. Eq. Ca. 94.

So, an assessment upon one only within the level, where others are in equal danger, or have equal benefit, is bad. R. 5 Co. 100. Adm. 10 Co. 143.

Or, an assessment upon a level, with direction to levy it upon one person. R. 2 Cro. 336.

If an assessment be irregular, equity does not aid it. R. Eq. Ca. 94, 95.

(E 3.) When the charge shall be upon the owner.

If a man be bound by tenure to the repair of a wall, sewer, &c. he shall be charged alone. Cal. 112. 10 Co. 139. b. 140.

And every one will be bound to whom such land comes. Cal. 90.

If A. and all his ancestors have time out of mind repaired, it is evidence of a tenure to repair. Cal. 89.

So, a corporation may be bound by custom to repair, without showing any lands by reason of which, &c. Cal. 88.

So, if A. and others drain a level, and are allowed a third part of the level, and thereupon agree to repair the banks of the whole, they will be charged to do it; though those who demand it are not parties or privies to the agreement. R. Hard. 169.

So, a man may be bound by his covenant to repair. Cal. 90.

And if the covenant be for him and his heirs, and assets descend, the heir will be bound. Cal. 90.

So, if no one be chargeable by tenure, prescription, or custom, to repair, the owner of the wall, bank, or other defence, may be charged for it. Cal. 88. 91.

Or, he who has lands adjoining; for a bank, wall, &c. against the sea belongs to him who has land adjoining. Cal. 8.

So, a man who has the use or profit of the wall, &c. or other defence, may be charged to it; as, if a man has security by such defence, in his ferry, crane, piscary, &c. Cal. 91, 92.

But a man cannot be bound by prescription to the repair, &c. unless it be shown that he has land *ratione cuius*, &c. Cal. 88.

Though he has always repaired, and also his ancestors; for it is only evidence that their land is liable. Cal. 88.

So, a man cannot be charged as owner, or having the use, &c. except where all others who have the use or profit, &c. are also charged in proportion. Cal. 92. Vide ante, (E 2.)—post, (E 5.)

(E 4.)

## (E 4.) When upon the level.

But where no one appears to be chargeable by tenure, prescription, custom, or covenant, the charge shall be imposed upon the level. Cal. 113.

Or, if land liable by tenure, prescription, custom, &c. be surrounded, or lost. Cal. 113.

Or, if land liable by tenure, &c. escheat. Cal. 113.

So, if land liable by tenure, custom, &c. is not sufficient, the residue shall be charged upon the level. Cal. 114, 115. 10 Co. 139. b.

Or, the hazard is manifest, whereby if a remedy be not immediately applied beyond what the land liable can supply, the whole country, &c. will be surrounded. Cal. 114. 10 Co. 139. b.

So, if damage happens by inevitable accident without the fault of the owner of the land liable, &c. the charge shall be upon the level; as, if it be by an extraordinary tide or flood. Cal. 114. R. 10 Co. 139. 8 T. R. 312.

So, the charge of a new wall, sewer, or other work, shall be upon the level, &c. Cal. 115.

And also the maintainance of it afterwards. Cal. 115.

## (E 5.) Who liable within the level.

All persons who have lands and tenements within the level, or profit *apprendre*, are liable upon the tax assessed upon the level, if they may have benefit by the repair, or prejudice by the non-repair.

[The level, and not the person bound by tenure or otherwise to repair a sea-bank, must repair it when destroyed by unavoidable accident. 8 T. R. 312.]

As, if they have land, meadow, marsh, mill, wood, &c.

Though it be his glebe. Cal. 100.

Though it be copyhold. Cal. 101.

So, land of the king, in ecclesiastical person, &c. Cal. 100.

So, none can be exempt by custom or prescription. Cal. 177.

So, a man who has a common, rent, &c. or other profit *apprendre* out of land, may be charged to the tax upon the level. Cal. 105. 107.

The lord of a manor for his quit rents, rents of assize, &c. Cal. 108.

So, a man who has common of turbary, piscary, &c. Cal. 105.

So, any who has a ferry. Cal. 105.

Or, a liberty of free passage by custom, or prescription. Cal. 106.

A park or warren within the level. Cal. 106.

So, to extraordinary repairs, which tend to the benefit of the inheritance, a lessor, or reversioner, or remainder-man, after an estate for life or years, may be assessed. Cal. 109, 110.

Or, for a new wall, sluice, sewers, &c. Cal. 110.

So, to repairs for the benefit of the country in general, a charge may be assessed upon land not liable to be surrounded; as, for repair of a public port, &c. Cal. 115.

So, by special custom which warrants a perpetual charge, a decree may be made for imposing a perpetual charge upon land for repair, &c. Cal. 158.

But

But tythes not in the lands of a layman, which arise upon land within the commission, cannot be charged. Cal. 100.

So, the lord of a manor cannot be charged for the freehold of his copyholds. Cal. 108.

Nor, a commoner after the corn severed; for it is but of small value. Cal. 105.

A reversion or remainder expectant after an estate-tail. Cal. 108.

Nor, an annuity; for it does not issue out of land, but charges the person only. Cal. 105.

Though the annuity be paid by a corporation, which cannot be bound, but in respect of their possessions. Cal. 105.

Nor, proxies, synodals, &c. Cal. 107.

Nor, a man who has only a casual profit; as, a fair, market, &c. Cal. 106.

Or, an office, as town clerk, clerk of a market, &c. though they are confined to a place within the level. Cal. 107.

Nor, a man who has only title of entry, or action. Cal. 107.

Nor, a mortgagor for his title to redemption. Cal. 107.

Or, a bargainee, before enrolment. Cal. 107.

Nor, a patron, founder, &c. in respect of his advowson, &c. Cal. 107.

So, no one can be charged for reparation, &c. but where he has a prejudice by the nuisance, &c. or a benefit by the reformation. R. 10 Co. 143.

[Those only are liable to be assessed by the commissioners of sewers, who derive, or are likely to derive benefit from the work in question. 3 M. & S. 477.]

So, to annual or ordinary charges assessed upon a level, a reversion or remainder after an estate for life or years shall not be charged. Cal. 110.

So, mountainous or high lands which cannot be surrounded shall not be charged. Cal. 104. 176.

So, the commissioners cannot impose a perpetual charge upon land for repair, unless it be warranted by a special custom. Cal. 158.

So, every person ought to be charged, according to the quantity of his land, and in proportion to his profit, &c. 10 Co. 143. Vide ante, (E. 2.)

(E 6.) Remedy for assessment: — By distress.

By commission founded on the st. 23 H. 8. 5. the commissioners may assess, distrain, punish, &c. as well within the limits accustomed, or otherwise, or elsewhere within the realm of England.

And may distrain for arrearages of every such collection, tax, and assess, as oft as shall be expedient.

And therefore, where an assessment is made upon lands by authority of the sewers, the officer, by warrant from the commissioners to him, may make distress upon the goods of the party for the assessment. Cal. 141.

So, the collector or officer may distrain without an express warrant. Cal. 141.

So, if an assessment be made upon land, liable to the repair, &c.; for the repair of any wall, sewer, or other defence, the cattle of a stranger, *levant*

*levant* and *couchant* upon the same land, may be distrained for such assessment. Cal. 145.

So, a distress may be taken upon the goods of any one charged to the assessment at any place within the limits of the commission, though it be not upon the land assessed. Cal. 143.

So, at any place within the kingdom. Cal. 144.

So, by the st. 7 Ann. 10. the commissioners, or any six of them, by warrant under hand and seal, may give authority to any person to levy money by them assessed on lands chargeable with such sess, by distress and sale of the goods of the person not paying; and the overplus, after the charges of distress and sale, shall be returned to the owner.

So, before that statute, by express warrant upon an ordinance made by the commissioners for the sale of them. Cal. 149. R. Al. 92.

But the goods of a stranger cannot be sold for an assessment upon A., though *levant* and *couchant* upon his land. Cal. 145. 151.

So, the goods of a stranger cannot be distrained for an amerciament upon A. for non-payment of a tax charged upon his land, liable to the repair of a wall, &c. for default of repair, though *levant* and *couchant*, upon the same land. Cal. 145.

#### (E 7.) By fines, amerciaments, &c.

If a man, assessed by the authority of a commission, neglects to pay at the time limited, he may be amerced for it. Cal. 134, 135.

So, if a collector, expeditor, or other officer, neglect his duty, he may be fined for it. Cal. 134.

#### (E 8.) By sale of lands: — When land may be sold.

So, by the st. 23 H. 8. 5. if any assessed, &c. for any lands within the commission, do not pay, &c. according to the ordinance of the commissioners, the said commissioners may decree the lands from the owner and his heirs to any person in fee, in tail, for life or years, for payment of such lot.

And therefore, for non-payment of a sess charged upon the land within the commission, the commissioners may sell the land. Cal. 161.

So, if a man be bound by tenure to pay so much per annum for repair of the sewers, and the commissioners make a decree that he pay it at such a day, for non-payment they may sell the land. Cal. 162.

So, if an assessment be assessed upon a vill, &c. in general, and afterwards by decree distributed among the owners of the lands within the vill, for non-payment they may be sold. Cal. 162.

So, all lands, tenements, and hereditaments, within the commission, chargeable to the sess, may be sold for non-payment. Cal. 162, 163.

And now by the st. 7 Ann. 10. the commissioners may decree a sale of copyhold lands in the same manner as freehold for non-payment of the lot assessed on them, for such estate as the owner had in them, or any claiming in remainder under him.

Provided he to whom the sale is made, before entry or perception of the profits, agrees with the lord for his fine, who shall thereon admit him tenant.

#### (E 9.) When not.

But the commissioners cannot sell land for other cause, except for non-payment of the assessment; as, for not repairing of a wall, &c. which he ought to repair by tenure, prescription, &c. Cal. 161.

So,

So, if A. be bound by tenure, &c. to pay 20s. per annum for repair, &c. they cannot sell the land for non-payment. Cal. 161.

Nor, for non-payment of a fine, or amerciamment, imposed by the commissioners. Cal. 162.

So, they cannot sell land which is not specially charged; as, where the assessment is imposed upon a town, &c. no land within the town can be sold. Cal. 162.

Nor, when an assessment is imposed upon the land without naming the owner; for some person ought to be assessed for such land. Cal. 162.

Nor, when the land does not lie within the commission, though it be charged by tenure or prescription, &c. to the repair of a wall, or other work which lies within the commission. Cal. 163.

So, they cannot sell in fee for an assessment which may be satisfied by a sale for years, &c. Cal. 186.

#### (E 10.) Who bound by a sale.

By the st. 23 H. 8. 5. a decree by the commissioners for the sale of land on non-payment of the sess, made and engrossed in parchment, and certified under their seals into chancery, with the king's royal assent to the same, shall bind all persons who, at the making of the decree, had interest in such lands in possession, reversion, or remainder, their heirs and feoffees, and not to be reformed but by authority of parliament.

And the same decrees shall bind the lands of the king, as well as of any other person, and their heirs, for such their interest, or any casual profit whatsoever.

And by this stat. the issue in tail will be bound by a sale of the land of his ancestor in tail. Cal. 166.

So, by such a decree, a *feme covert*, infant, and *non compos* will be bound. Cal. 167.

So, by the st. 13 El. 9. decrees being written in parchment, indented under seal of the commissioners, though not certified into chancery, or having the royal assent, shall continue in force, though the commission be superseded or determined, till altered by subsequent commissioners.

But by a sale of the land of a parson, vicar, dean, bishop, &c. seized in right of his church, his successor is not bound; for by the st. 1 & 13 El. they are restrained from an alienation that binds the successor. Cal. 166.

So, for non-payment of a joint-tenant, or tenant in common, of his part of an assessment, only his moiety of the land shall be sold. Cal. 167, 168.

#### (F) Account of officers.

By commission upon the st. 23 H. 8. 5. the commissioners may assign faithful keepers, bailiffs, surveyors, collectors, expeditors, and other officers, for the conservation, reformation, or making the premises; and may hear the accounts of all collectors and other ministers for laying out money, &c. for repairing, reforming walls, ditches, sewers, &c.

And every commissioner shall have 4s. per day while he labours in execution of the commission; and one clerk to be assigned 2s. per day

day of the rates, &c. assessed; and the commissioners have power, out of the said rates, &c. to assign to the clerk reasonable sums for writing books, process, &c.; and to collectors, expeditors, &c. as they or any six think reasonable.

### (G) Traverse of a presentment.

If any be aggrieved by a presentment before commissioners of sewers, he may traverse the presentment. Cal. 169. 171.

But a thing done by the commissioners by their survey is not traversable; for they do that as justices, and it is the act of the court. Cal. 172.

So, if they fine any for a contempt in court, it cannot be traversed. Cal. 172.

So, the traverse ought to be taken before decree of the commissioners. Cal. 172.

### (H) Decrees of the commissioners.

#### (H 1.) What good.

By commission upon the st. 23 H. 8. 5. the commissioners may make statutes, ordinances, and provisions, for the safeguard, redress, &c. of the premises, &c. after the laws and customs of Romney Marsh, &c. after their own wisdoms and discretions.

And by the st. 23 H. 8. 5. they may make laws, ordinances, and decrees, and do every thing mentioned in their commission, according to the true meaning of the same; and the same laws, &c. to reform, repeal, and amend, as the case shall require.

And therefore the commissioners may make rules, orders, and decrees, in all cases within their authority and commission.

In what cases they have jurisdiction, vide ante, (C 1, &c. — D — E 1. &c.)

And the orders and proceedings of the commissioners, as well as the commission itself, shall be in English, and not in Latin. 1 Sid. 78.

And does not require so strict a form as an indictment. 1 Sid. 78.

If it charges A. to the repair, it need not say what estate he has. R. 1 Sid. 145.

#### (H 2.) What not.

But a decree by commissioners will be void, unless it be according to law and justice; for, according to their discretion, imports that. R. 10 Co. 140. a.

So, they cannot pursue laws and customs of Romney Marsh, not warranted by the general laws of sewers, except in such places where such customs by usage have been allowed. R. 10 Co. 140. a.

#### (H 3.) Execution of orders.

By commission upon the st. 23 H. 8. 5. the commissioners are authorised to compel by distress, fines, amercements, and other punishments, ways, or means, &c. all they find negligent or rebelling in the works, reparations, &c. or negligent in the due execution of the commission.

#### (H 4.) Duration of.

[The words in the st. 23 H. 8. c. 5. s. 17. "laws, acts, decrees, and ordinances," and the words in the st. 15 Eliz. c. 9. "laws, ordinances,

dinances, and constitutions," are used to express the same things; the duration, therefore, of the decrees, &c. of commissioners of sewers, depends upon the provision of the latter statute. 9 East, 109.]

**(I) Remedy for default of the commissioners.**

**(I 1.) By *certiorari*.**

If the commissioners make an order in a matter out of their jurisdiction, the order may be removed by *certiorari* into B. R. and quashed. R. 2 Cro. 336. R. 1 Vent. 67.

And if the commissioners proceed after a *certiorari* allowed, an attachment shall go against them, and they shall be fined for their contempt. 1 Lev. 288. 1 Vent. 67. 1 Mod. 44. Ray. 186.

Though by the st. 13 El. 9. the commissioners shall not be compelled to return any of their ordinances, laws, or doings, or suffer in their body, lands, or goods for that cause; for this does not relate to returns to be made upon *certiorari*, but to the return of their decrees in chancery. R. 1 Lev. 288. 1 Vent. 67.

So, if the contempt be outrageous, they may be imprisoned. 1 Vent. 66. R. 2 Cro. 336.

Or, indicted for a *premunire*. Per Twiss. 1 Mod. 44. R. 2 Cro. 336.

So, a *certiorari* lies to remove an order for appointing or removing a clerk, &c. 2 Mod. Ca. 331.

And if the *certiorari* be quashed, another may be granted. 2 Mod. Ca. 331.

But where an order is made for repair upon an inquisition, finding that he ought to repair, the court will not grant a new trial, or quash the order, except where the party consents to the repair in the mean time; and if found that he ought not, he shall be reimbursed. 1 Sid. 78.

So, if an order be good in part, it shall be confirmed for so much, though it be quashed for the residue. 1 Sid. 145.

So, a *certiorari* cannot be demanded of right, but shall be in the discretion of the court upon proper cause. 2 Mod. Ca. 331.

[The preponderance must be very strong against the propriety of an order of commissioners of sewers, to induce the court to grant a *certiorari* to remove it, since by delay the country may be inundated. 8 T. R. 312.]

[Issues set by a judgment of the commissioners may be discharged on motion; though a *certiorari* would not lie originally to remove their order. Bunb. 61.]

[If orders are removed by *certiorari*, and commissioners offer to try any issue defendant will take, which he refuses, the court will not thereupon grant *procedendo*; but they will not file the orders till the objections are first debated, that they may have it in their power to send them back. Str. 1863.]

**(I 2.) By action.**

So, an action lies against the commissioners, or those who act by their precept, if they do any thing out of their authority. Gent. Mo. 626.

[(K) *Printed*]

## SHIP.

## [(K) Pleading.]

[It seems that it will be presumed that a place alleged in pleading to be a sewer, is a common sewer; at all events it will, if it be further alleged that the tide ebbs and flows there. 2 T. R. 358.]

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**SHEEP EXPORTED.**

Vide JUSTICES, (S 10.)

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**[SHEFFIELD.]**

[Under st. 29 Geo. 2. c. 37. the courts baron of Sheffield and Ecclesall have no jurisdiction over residents within their precincts, unless the causes have likewise arisen therein. 6 T. R. 242.]

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**SHERIFF.**

Vide VISCOUNT,

**Sheriff's court.**

Vide COUNTY, (C 1, &c.) — COURTS, (O 4.)

**Sheriff's torn.**

Vide LEFT, (A — B.)

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**SHIP.**

- [(A) Ownership in.] infra.
- [(B) What ships are entitled to registry.] p. 353.
- [(C) What must be registered.] p. 353.
- [(D) Transfer and sale of ships.] p. 353.
- [(E) Mortgage of ships.] p. 355.
- [(F) Lien upon ships.] p. 355.
- [(G) Contracts relating to ships.] p. 356.
- [(H) Decrees relating to ships.] p. 356.
- [(I) Forfeiture of ships.] p. 356.
- [(K) Statutes.] p. 356.

## [(A) Ownership in.]

[If, at common law, a ship purchased by two partners, would, so far as creditors are concerned, be considered partnership property, though their titles appear, by the certificate of registry, to be not joint but distinct and separate; they are joint nevertheless; the property, therefore, will, on their bankruptcy, form part of their joint estate.

The policy of the registry acts, to exclude foreign interests, in British ships, is gained by simply naming the owners in the certificate; the specifying of their interests, therefore, is not required by those acts; consequently, such specification is not made by them conclusive (and by their operation only could it be conclusive,) upon the parties. 4 M. & S. 450.]

[Presumptive proof of ownership in a vessel, is not rebutted by evidence of an antecedent, and a subsequent registration in another. 4 Esp. 130.]

**[(B) What ships are entitled to registry.]**

[A ship which appears from the sentence of condemnation to have been confiscated for engaging in the slave trade, contrary to 46 Geo. 3. c. 52. is not entitled to registry under 26 Geo. 3. c. 60. though the judge has certified that the ship was condemned as lawful prize. 1 M. & S. 262.]

**[(C) What must be registered.]**

[A foreign built ship, British owned, need not be registered. 2 B. & P. 209.]

**[(D) Transfer and sale of ships.]**

[A title, whether legal or equitable, to ships within st. 26 Geo. 3. c. 60. can only be acquired by a bill of sale in writing, pursuant to that statute. 5 T. R. 709.]

[A ship, whilst it specifically subsists and is capable of being used as such, for the purposes of navigation, is an object of the registry acts. 10 East, 143.]

[Sect. 15. & 16. of st. 34. Geo. 3. c. 68. on the transfer of ships, extend to every case of transfer; therefore, to one where the ship though not at sea, and though absent from her own port, is not so absent but that an indorsement on the certificate of registry may be made. 8 East, 511.]

[Sect. 16. of st. 34. Geo. 3. c. 16. applies as well to the sale of the entire ship as a share or shares. 3 Taunt. 177.]

[A bill of sale, which does not truly recite the certificate of registry, is a nullity. 7 T. R. 306.]

[The deed of assignment need not recite the indorsements on the certificate of registry. 1 B. & P. 483.]

[The delivery by the party of a copy of the bill of sale, for the purpose of entry, memorandum, and notice, pursuant to st. 34 Geo. 3. c. 68. s. 16. is essential to the transfer of a ship at sea. 4 East, 110. 3 Taunt. 177.]

[The names of the proper officers whose signatures are necessary to give validity to a certificate of registry, need not be mentioned in a bill of sale reciting the certificate. 4 T. R. 161.]

[The acts by the officer of the out-port to indorse the entry of the transfer on the oath, on which the original certificate was obtained, to make a memorandum thereof, and to notify the same to the commissioners in London, pursuant to 34 Geo. 3. c. 68. s. 16. are not essential to the transfer of a ship at sea. 4 East, 110.]

[The property passes by the indorsement on the certificate, notwithstanding

standing in relation to the proper officer to transmit a copy thereof to the office in London. 1 Taunt. 507.

[The st. 34 Geo. 3. c. 68. s. 15; relative to the sale of ships, which, that upon any alteration of property in any ship, the indorsement upon the certificate of registry shall be made in the form there expressed, and shall be signed by the persons transferring the property by sale, contract, or agreement for sale, or some person authorized by them, and a copy of such indorsement shall be delivered to the person authorized to make registry; otherwise such sale, contract, or agreement, shall be utterly null and void to all intents and purposes whatever; not limiting any time for the delivery. The delivery is not a condition precedent to the vesting of the property, so that it may be done in a reasonable time, the requisition in the statute is satisfied. The property passes on the execution of the bill of sale, and the regulations of the statute are in the nature of conditions subsequent, having the effect of defeating property already vested, from what they require not having been done in a reasonable time. 3 M. & S. 495.]

[An indorsement on the certificate of registry, and a delivery by the vendee, of a copy of such indorsement to the persons authorized to make registry, pursuant to the statutes, is the only mode of effectuating the transfer of a ship at sea. 5 East, 407. 1 Smith, 487. 3 Taunt. 177.]

[*Semble*, the indorsement should be made at the time of making the bill of sale, or in a reasonable time afterwards. 2 Smith, 227. 6 East, 144.]

[The course to be pursued under the registry act on the transfer of a ship at sea, registered at one port, to a purchaser residing at another, is, to register the ship *de novo*, in her own port. Nor need she return to her old port, that an indorsement of the transfer may be made on her certificate; nor need a copy of the bill of sale be sent there by the purchaser; nor need an indorsement of the transfer be made on her certificate within ten days after her arrival in England. 3 Taunt. 177.]

[The indorsement of a bill of sale of a ship, on the transfer of property therein, is not valid within the registry acts, made on a register which is cancelled and void, even though it was so cancelled in consequence of obtaining a former register *de novo*, which was invalid. 2 Smith, 227. 6 East, 144.]

[The st. 26 Geo. 3. c. 60., intending that British ships should be entitled to certain privileges and benefits, by way of securing them to the owners of those ships, stated, that there should be a certificate of the registry of the ship, and that "when and so often, as the property in any ship belonging to any of his majesty's subjects, shall be transferred to any other of his majesty's subjects, the certificate of the registry of such ship shall be truly and accurately recited in words, at length, in the bill or instrument of sale thereof, otherwise such bill of sale, shall be utterly null and void." The owner of a ship at sea, executed a bill of sale, reciting the certificate of registry as it was abstracted in one of the public offices as required, but in which abstract the date of the condemnation (for it was a prize) was mistaken, in that 1783, was put for 1782, the true date, and the one mentioned in the original certificate of registry which was with the

the registry, as is sought to be shown upon the face of the recital of the registry, that the date was mistaken, though not in what particular. *4 T. R. 161.* And that under these circumstances, the bill was good. *4 T. R. 161.* And if a purchaser, who transfers his share, without expressing in the instrument of transfer that the transfer is of his entire interest.

The register acts are not applicable to a transfer by operation of law, such as in bankruptcy. *5 East, 407.* *1 Smith, 487.* A ship may be effectually transferred, provided the vendor takes possession by himself or his agent, so soon as he has an opportunity. *1 M. & S. 246.* *1 Anst. 222.*

The property does not pass by the bill of sale, but only on completion of the acts required by the statutes of registry. *2 East, 339.* *3 Taunt. 206.*

For a mortgagee's covenant for repayment in a bill of sale, void for want of the certificate of registry, is available. *8 East, 231.*

[The title to a ship is at all events, vested in the trustee under a bill of sale in trust for persons not named. *4 East, 110.* *3 Taunt. 177.*]

Whether an executory agreement for the sale of a ship, must recite the registry under the 26 Geo. 3. c. 60. s. 17, *quære.* *1 Anst. 222.*

### [(E) Mortgage of ships.]

[An instrument under seal, executed by the master, (who was also owner) for the repayment of money borrowed for repairing the vessel, thereby stipulating that the "vessel should be and remain a security by way of bottomry, for the repayment thereof, and that as well his executors, &c. as the said vessel, should be bound in the penal sum of so much," operates as a mortgage of the vessel; so that the party may take possession; after which, his right is not defeasible by a subsequent execution at the suit of another creditor. *2 T. R. 649.*]

[A bill of sale, with a stipulation that it was made as a lien or security for money lent, and that the vendee might sell and transfer, is a contract, not of lien, but of mortgage or pledge. *3 Taunt. 642.*]

[A bill of sale absolute upon the face of it, of a ship by one British subject to another, though the ship is at sea, and though there be a collateral agreement denoting that the transaction is a mortgage only, is void by st. 26 Geo. 3. c. 60. s. 17., unless it recites the certificate of registry. *3 T. R. 406.*]

[The transfer of a ship by way of mortgage or pledge is within the ship registry acts. *3 Taunt. 642.*]

### [(F) Lien upon ships.]

[A commissioner B. to sell a ship for him, and having deposited her register with him for that purpose, becomes bankrupt. Held, that B. had a lien on the register against the assignees of A. for the amount of his demand against A., consisting partly of charges incurred on the ship's account, and partly of other charges; and that this was not such a transfer of the property as to bring the case within the meaning of the register acts. But the ship, when put up to sale, having been brought in, held, that B. was not entitled to a commission on the sale of her. *1 Mars. 76.* *5 Taunt. 381.*]

[No lien is created by an instrument which imports upon the face of it, that the ship is to be sold. *A. & 2*

of it to be a contract of sale, but which is void as such; since that would be to substitute a different contract to what the parties intended. Therefore, a creditor to whom a ship at sea is sold by a bill of sale, void from not reciting the certificate of registry under st. 26 Geo. 3. c. 60. s. 17., requires no lien for his demand by taking possession on its return to port. 3 T. R. 406.

### [(G) Contracts relating to ships.]

[A contract to return a sum of money if B., a seaman, did not proceed with such a vessel on such a voyage, is not an undertaking that B. is a seaman. 1 Taunt. 65.]

[The value of repairs may be recovered, though a ship be burned in dock. 3 Burr. 1592.]

[A covenant to pay the plaintiff a certain sum of money yearly, in lieu of his share of the profits of a vessel as a part-owner, is not discharged by the capture of the vessel, provided the property in her be not altered by condemnation. Forrest, 4.]

### [(H) Decrees relating to ships.]

[A decree by a vice-admiralty court, made upon the petition of the master of a ship, reported upon survey not seaworthy, or repairable, so as to carry the cargo to its place of destination, unless at an expense exceeding the value of the ship when repaired for the sale thereof, is void. 10 East, 143.]

### [(I) Forfeiture of ships.]

[A private vessel is forfeited by the contraband traffic of an officer placed in command by the board of admiralty. 13 East, 19.]

[The seizure of a ship forfeited under the navigation act, devests the property. 5 T. R. 112.]

[Seven terms having elapsed without the attorney-general's bringing on the trial of an information for a seizure, the court directed the vessel to be returned without security. 3 Anst. 753.]

[In an information upon seizure of a vessel, upon affidavit of injury from delay, a writ of delivery was granted on security, after two terms; the defendant waited three terms more without a trial, and then moved to discharge the recognizance; the court held that the crown ought to have six terms in all; and that a reasonable cause of delay (absence of witnesses abroad) should be allowed after the six terms. 3 Inst. 805.]

### [(K) Statutes.]

[The statutes 24 Geo. 3. c. 47. & 27 Geo. 3. c. 32., do not so clearly mark the distinctions between the different sorts of vessels there mentioned, as to supersede evidence upon it. 1 Anst. 23.]

[A refusal by the master to deliver up to the owner the certificate of registry, is no offence within st. 34 Geo. 3. c. 68. s. 18. 13 East, 91.]

[A ship purchased by a British subject from an enemy, under a licence, is not the ship of a country in amity, within st. 26 Geo. 3. c. 60. s. 1. 1 Taunt. 856.]

### Master of ships.

Vide MERCHANT, (E 5, 6.)—NAVIGATION, (I 4.)

Navigation of ships.  
Vide NAVIGATION, (I. 1, &c.)

**SHIRE.**  
[Vide to ships.]

[A contract to sell a shire, is not an undertaking that  
need with such a shire, is not an undertaking that

**SHOOTING.**  
Vide JUSTICES OF THE PEACE, (B 43.)

[A contract to sell a shire, is not an undertaking that  
need with such a shire, is not an undertaking that

**SIGNET.**  
Vide PATENT, (C 6.)

**SIGNIFICAVIT.**  
Vide EXCOMMENGEMENT, (B 3, &c.)

**SIGN MANUAL.**  
Vide PATENT, (C 7.)

**SILVER MINES.**  
Vide WAIFE, (H 1.)

**SIMONY.**  
Vide ESGLISE, (N 3.)

**SINGLE BILL.**  
Vide OBLIGATION, (C.)

**SLANDER.**

**Slander of a common person.**

Vide ACTION UPON THE CASE FOR DEFAMATION, (D 1, &c.)

**Slander of a peer.**

Vide ACTION UPON THE CASE FOR DEFAMATION, (B 1, &c.)

(C 4.)

**Slander of a title.**

Vide ACTION UPON THE CASE FOR DEFAMATION, (C 1, &c.)

A 3 SOCAGE.

[SOUTH SEA COMPANY.]

**SOCAGE.**

[The South Sea Company v. The Commissioners of the Customs, 10 M. & W. 121.]  
[Residence within the limits of the South Sea Company of Customs, 10 M. & W. 121.]  
[The South Sea Company v. The Commissioners of the Customs, 10 M. & W. 121.]

**SOLDIERS.**

[The exception in the case of soldiers, 10 M. & W. 121.]  
[The exception in the case of soldiers, 10 M. & W. 121.]  
[The exception in the case of soldiers, 10 M. & W. 121.]

Vide JUSTICES, (S. 8.)

**SOLICITOR.**

Vide ATTORNEY, (B 1, &c.)

**SOLVIT AD DIEM.**

Vide PLEADER, (2 W. 29.)

**SORCERY.**

Vide JUSTICES, (S. 13.)

**SOULS.**

Cure of souls.

Vide ECCLESIASTICAL PERSONS, (C 15.)

[SOUTH SEA COMPANY.]

[South sea licences are annexed to the particular vessel. 4 M. & S. 16.]

[They cannot operate retrospectively. Therefore, the insurance of a ship trading within the exclusive limits, is not made available by a subsequent licence. 4 M. & S. 16.]

[A licence is unnecessary for the carriage home, in a king's ship, of bullion, the proceeds of a licensed adventure. 4 Taunt. 787.]

[Their books are evidence of their licence granted. 4 Taunt. 787.]

[The open trade sanctioned by 42 G. 3. c. 77. may be prosecuted without fishing. 3 Taunt. 854.]

[47 G. 3. s. 1. c. 28. has not a retrospective operation, and repeals the st. 9 Ann. c. 21. only in the particular cases proposed. 3 M. & S. 117.]

[And does not legalize a trading and therefore not an insurance thereon, within the exclusive limits, to a place known to have been captured from, but which, though the fact was unknown, had been recaptured by the enemy. 4 Taunt. 227.]

[SOUTH-

## [SOUTHWARK COURT OF CONSCIENCE.]

[The Southwark Court of Conscience has no jurisdiction over causes arising from negligence or misfeasance. 1 Taunt. 696.]

[Residence within the jurisdiction of the Southwark Court of Conscience gives jurisdiction; though unknown to Plaintiff, and though the defendant carry on his business, and the cause arose without. 15 East. 647.]

[The exception in the statute embraces all cases, and not merely those in which the reduction is by a set off. 1 Taunt. 60. But a reduction, stipulated by the terms of the original contract, is not of it. 14 East. 344.]

## SPEAKER.

Vide PARLIAMENT, (E 5. — G 14.)

## SPECIAL CASES.

[It is ordered, that from the last day of Michaelmas term, 38 Geo. 3. all special cases to be set down by the clerk of the papers to be argued, shall be entered within the first four days of the term next after the trial at which such special cases shall have been reserved: and further, that such special cases shall never be set down for argument on any of the last four days of term. Reg. Gen. M. 38 Geo. 3. 7 T. R. 454.]

## SPECIAL DAMAGE.

Vide ACTION ON THE CASE FOR DEFAMATION, (D 30. — G 11.)

## SPECIAL PLEA.

Vide PLEADER, (E 15, &c.)

## SPECIALTY.

Vide DETR, (A 4.) — TEMPS. — (G 15.)

## SPEECH.

Vide PARLIAMENT, (G 7, 8, 9.)

## SPIRITUAL LORDS.

Vide PARLIAMENT, (D 2. — G 19.)

## SPIRITUAL OFFICES.

Commission to spiritual offices.

Vide PROHIBITION, (G 4.)

**SPIRITUAL PERSONS.**

*Vide Dismes, (C. 2. — E 2. 8.) — PLEADER, (2 S. 22.)*

**SPIRITUALITIES.****Guardian of spiritualities.**

*Vide PREROGATIVE, (D 26, 27.)*

**SPOILIATION.**

*Vide Dismes, (M 1.)*

**SPORTS UNLAWFUL.**

*Vide JUSTICES OF THE PEACE, (B 42.)*

**SPRINGING USE.**

*Vide USES, (K 7.)*

**STABBING.**

*Vide JUSTICES, (M 14.)*

**STALLAGE.**

*Vide MARKET, (F 2.)*

**STAMPS.**

[The numerous acts which have been passed on this part of the revenue, render it necessary to refer the reader to them, without attempting an abstract.]

[A stamp having been used for an effectual purpose, it cannot afterwards be used for another, though of precisely similar nature to the first. 5 T. R. 695.]

[An unstamped bill or note is a nullity, and therefore imposes no obligation to present it. 2 Taunt. 288.]

[Nor will equity relieve. 5 Ves. 240, vide 1 Anst. 45.]

[In the case of a deed, a stamp is only essential to its admissibility in evidence. Loft. 341.]

[If the instrument cannot be stamped, the contract is void. 7 T. R. 1317.]

[The time of, is a circumstance altogether immaterial; a motion, therefore, founded on the want of a stamp, is defeated by a subsequent stamping. 2 Mars. 480. 7 Taunt. 174. 2 B. C. C. 32. 11 Ves. 595. 17 Ves. 347.]

[An *ad valorem*, or stamp, of higher value, of an improper denomination, is not available, unless by statutory provisions. 6 T. R. 317. 42 R. 60.]

[A stamp of greater value than the one prescribed is sufficient, provided there is a stamp in the schedule of that identical amount, and that where the regular stamp is made up at different sums, imposed by different acts, and each sum is applicable to a different fund appropriated to the public service; the stamp imposed is likewise applicable to the same funds, and in proportion not less than is the regular stamp. 1 East, 55. 2 East, 414. See 3 East, 312.]

[An ancient writing may be stamped with the impression now in use. 4 Taunt. 20.]

[In the case of a warrant of attorney defeazanced, the defeazance is covered by the stamp to the warrant. 1 N. R. 279.]

[In the case of a composition deed, only one stamp is requisite, though each creditor executes separately. 1 N. R. 278.]

[In the case of separate obligors in one bond, where the obligation is for the self same thing, only one stamp is requisite. 1 N. R. 274.]

[In the case of an agreement by underwriters to refer to arbitration, the agreement and the award require only single stamps each. 1 Mars. 525. 6 Taunt. 171.]

[In the case of an agreement relative to prize shares, though several as to each person, one stamp only is requisite. 13 East, 235. n.]

[In the case of an agreement by several for a subscription to construct a dock, a single stamp is sufficient. 13 East, 23. n.]

[A petition in bankruptcy, praying distinct orders under several commissions, requires several stamps. 18 Ves. 439.]

[A paper containing contracts by several persons, relative to different things, though stamped with a single stamp, is evidence for one where the stamp appears applicable exclusively to his name. 12 East, 6. 13 East, 241.]

[That an affidavit entitled in several cases may be read, it must be impressed with a corresponding number of stamps. 9 Taunt. 469.]

[In the case of admissions to the freedom of a corporation, the first only of several admissions, entered on one stamp, is good. Dough. 217.]

[An award under seal, delivered as such, requires an award stamp only. 4 East, 585. 17 Ves. 232.]

[An appraisement stamp is proper for a valuation by referees pursuant to an agreement. 12 East, 1.]

[An instrument authorizing the execution of a deed, ~~scilicet~~, need not be stamped as a deed. 4 East, 430.]

[Agreements, whether real or personal, they are liable to a duty. 2 Taunt. 438.]

[A schedule annexed, must be stamped as a part of the instrument to which, &c. 3 East, 326.]

[Any writing which would be an evidence, though only of part of the contract, must be stamped. 2 M. & S. 445. But a slip of paper not signed nor required to be signed by either party, handed by the auctioneer to the vendee, describing the premises, terms and mode of sale of premises by auction, need not be stamped. 2 M. & S. 445.]

[An agreement to confess judgment for a sum exceeding 20*l.* to secure a sum under that amount, and costs, is exempt. 2 B. & P. 150.]

[When an article is sold by auction in separate lots to the same purchaser, if each lot separately is under 20*l.* value, no stamp is requisite. 2 Taunt. 38.]

[An

[An agreement by a broker to indemnify his principal, on the receipt of goods purchased by him. 8 T. R. 684. 2. A guarantee for the purchase of goods. 3. An agreement to share in goods purchased by the other party on their joint account. 18 East, 74. 4. An agreement to sell off to be made from raw materials. 18 East, 118. 5. Taunt. 71. are contracts relating to the sale of goods.]

[Thus when the subject does not exist in the state of goods, 2 B. & P. 451. 2. An agreement for the making of goods. 3 East, 323. these are not.]

[A letter written by one who manages another's trade, binding himself to pay a debt contracted therein, is a letter between merchants. 8 T. R. 176.]

[The day on which a draft is delivered is the day of issuing it, though it is not to be used till afterwards. 1 East, 435.]

[The words "acting as bankers" are to be taken in their popular sense. 2 B. & P. 386.]

[A appointment of an umpire need not be stamped. 4 Taunt. 704.]

[The transit from Scotch to English ports is not an exportation. 1 Mann. 304. 5 Taunt. 339.]

[As well simple leases as those under seal, must be stamped. 1 T. R. 735.]

[Assignment of a lease, when not under seal, did not formerly require a stamp. 1 N. R. 270.]

[A placing out apprentice by trustees of a charity, who, though parties to the deed, do not execute it, is exempt from the duty. 2 M. & S. 332.]

[Cognovit, if without terms of agreement, need not be stamped. 2 B. & P. 150. 4 East, 132.]

[Declaration filed, and copy delivered in the exchequer, must be stamped. 2 Price, 114.]

[Copy of a judgment reversing a decree, need not be stamped. Cowp. 17.]

[An office copy of the declaration cannot be written upon both sides of single stamped paper. 12 East, 294.]

[It is irregular to deliver a copy of a bill or declaration with extensive obliterations, and containing under one four-penny stamp, more folios than in practice are usually included. 1 M. & S. 709.]

[Note for a prisoner's allowance under the lord's act, need not be stamped. 7 T. R. 670. Id. 330. 1 B. & P. 270.]

[A commission of bankruptcy need not be stamped. 1 Taunt. 71.]

[Devise for life of the rents of reality and dividends of personality, neither payment is liable to the duty. 2 H. B. 30.]

[A deed of settlement of leasehold and personality, retained by the party during his life, and confirmed in most respects by his will, will be considered a testamentary instrument, and the dispositions therein be liable to duty. 3 Price 368.]

[Legacies devised by one in India, but paid here under a will proved here, are liable to the duty. 1 Price, 165.]

[A bequest of real property to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, or go in aid, if necessary, of the rest of his property, in discharge of his pecuniary legacies, is liable to the duty, though the residuary legatee took the property *in statu quo*. 1 Price, 426.]

[Legacies

of the duty, and paid under a charge upon real estate in each of the parcels, without production of the stamp under the legacy act, 36 G. 3. c. 52. s. 7.] It is ascertained that there is no personal liability for the duty, and that it is a charge upon the real estate.

[Where shall be an appropriation of a legacy within 48 G. 3. c. 49, s. 2. Mor. 46.]

[A bill drawn abroad, and indorsed abroad, with blanks for the date, drawn etc. and filled up here by one for whose name it was admitted, does not require an English stamp. 1 M. & S. 87. 1 Mars. 29. 5 Taunt. 529.]

[An agreement in England to accept a bill drawn abroad, must be stamped. 1 Mars. 29. 5 Taunt. 529.]

[A writing is inadmissible, where, by admitting its effect, it gives to an unstamped instrument. 2 B. & P. 363.]

[Where an instrument consists of two parts, the one stamped, the other not, secondary evidence of its contents may be given by the party in possession of the unstamped part, or his adversary's refusal after notice to produce the other. 1 Taunt. 507.]

[Unstamped instruments, executed abroad, cannot be admitted if inadmissible abroad. 7 T. R. 261.]

[The refreshment of a witness's memory, 1 East, 460.]

[The proof of an agreement, expired, under the terms of which the parties impliedly continue, 15 East. 449.]

[And the proof that a letter, containing the unstamped instrument, was stolen, 3 B. & P. 311, are collateral purposes for which an unstamped instrument is admissible.]

[Proof on an indictment for setting fire to a house, with intent to defraud the insurers, of an indorsement on the policy allowing their removal to that house, 1 Taunt. 95.]

[And a lease adduced to prove that fixtures cannot be paid for in an action for their value, 3 Taunt. 382, are not such.]

[Parol evidence in lieu of written instruments is inadmissible where the instrument is the only proof of the fact. 6 T. R. 469. 1 N. R. 271. 3 B. & P. 309.]

[If a bill or note given in payment cannot be stamped, the creditor may sue on the original demand. 7 T. R. 261. 1 East. 56. 1 Taunt. 353.]

[A mistake may be rectified by consent without restamping. The instrument in this case was a deed, which was delivered *de novo*. 12 East. 474.]

[Where the alteration in a policy is in the subject matter. 4 Taunt. 169. Thus from ship and outfit (in voyages upon the Southern Whale Fishery) to ship and goods, 8 East. 273, a new stamp is requisite.]

[In the case of, 1. The correction of a mistake in a policy in the name of the ship, written by an agent in the margin. 1 M. & S. 217.

2. Extension of the time of sailing. 8 East. 273. 3. Cancelling a warranty to sail on such a day. 4 Taunt. 169. 4. The alteration in the interest declared from "ship" to "goods as interest may appear,"

the insured having no interest in the ship. 1 Mars. 99. 5 Taunt. 359.

5. Cancelling marks on goods whose import is unknown. 4 Taunt. 169. A new stamp is unnecessary.]

[The restoration of rent is not an essential to exempt leases for fines on the *ad valorem* duty. 4 M. & S. 23.]

[Where

[Where the distinct interests of several are insured under one entire sum, "to be thereafter declared and valued," the stamp must cover the fractional parts of 100% in each interest. 15 East, 601.]

[A bond for the payment of rent is liable to a similar duty with other bonds. 2 M. & S. 88.]

[Bond for securing money already advanced, and to be advanced in account current, must, without reference to the penal sum, have a 50% stamp. 2 Price, 30.]

[The duties now payable on apprenticeship deeds, are under 48 G. 3. c. 149. 4 Taunt. 876. See the new stamp act.]

[Covenant by the father to clothe and maintain the apprentice is not a "benefit," within the statute. 4 T. R. 799.]

[Stipulation by the apprentice to allow his master 2s. per week, the master to allow him wages, is not a benefit. 1 M. & S. 151.]

[Or, by the apprentice to supply himself with necessaries, the master to allow him a weekly sum (unless such sum is shown not to be an equivalent.) 8 T. R. 511.]

[Or, by the apprentice to allow the master his earnings, or a part. 1 East, 601.]

[A warrant under seal, to confess judgment and release errors, is within the exemption, in stat. 37 Geo. 3. c. 111. 4 East, 431.]

[Close copies may be used as evidence, without any additional, to the common stamps. 1 Blk. 288.]

[The case of a bequest within the meaning of the clause in 48 G. 3. c. 149. schedule 3. not paid, retained, satisfied, or discharged, till after 10th October, 1808. 1 Price, 411.]

[The residue is to be computed upon the aggregate amount of the residue of testators' property, as it stood when executor delivered into the stamp-office the note of what he intends retaining of residuary legatee. Wightw. 82.]

[In an apprenticeship deed, a larger sum than what was paid, may be stated as the fee. 5 East, 309. 2 M. & S. 338.]

[Penalties under 1 Ann. sess. 2. c. 22. are incurred by erasing names and dates upon letters of attorney, made in England, to collect debts abroad. 5 Burr. 2678.]

## STANDING MUTE.

VIDE JUSTICES, (X 2.)

## STANDING SEISED.

VIDE COVENANT, (G 1, &c.)

## STANNARIES.

VIDE COURTS, (L 1, &c.) — WAIFE, (H 2.)

## STAR-CHAMBER.

VIDE COURTS, (K.)

STATE-

**STATE OFFICERS.**

**Vide OFFICER, (L.)**

**STATUTE.**

**Vide ACTION UPON THE STATUTE.** — **COPYHOLD, (N 7, O.)** — **FEIGN, (C.)** — **JUSTICES, (S 1, &c.)** — **PARLIAMENT, (G 10, &c.)** — **PLEADER, (G 16, &c.)** — **PROHIBITION, (F 8.)**

**Exposition of statutes.**

**Vide PARLIAMENT, (R 10, &c.)**

**Recital of a statute.**

**Vide ACTION UPON STATUTE, (G — H — I.)** — **PLEADER, (G 16, &c.)**

**Repeal of a statute.**

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**Statute of distributions.**

**Vide CHANCERY, (3 D 1.)**

**Statute against gaming.**

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**Statute of limitations.**

**Vide CHANCERY, (I 1. — 4 W 17. — TEMES, (G 1, &c.)**

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**Vide USES, (B 1, 2.)**

**STATUTE-MERCHANT.**

**Vide STATUTE-STAPLE.**

**STATUTE-STAPLE.**

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(A) Statute-merchant and staple, how bound by it.

By the stat. 11 Ed. 1. *de Acton Burnell*, a merchant may cause his debtor to come before the mayor of the staple, &c. and make recognizance of his debt, which shall be entered on the roll, with the seal of the debtor and the king, in custody of the mayor, &c.

By the st. *de Merc.* 13 Ed. 1. he shall come before the mayor, &c. or other sufficient men sworn thereto, if the mayor, &c. cannot attend, and acknowledge his debt and day of payment; and the recognizance shall be enrolled, and the roll double; one part to remain with the mayor, &c. the other with the clerk thereto named; and the clerk shall make an obligation, to which the seal of the debtor shall be put with the king's seal, &c.; of which the one part shall remain with the mayor, &c. the other with the clerk.

By which statutes the mayor, with the constables of the staple, may take recognizances of merchants of the staple for merchandize only of the same staple, and not of others. Vide the st. 25 H. 8. 6.

The clerk of the staple shall be named by the king, who may discharge him, and name another at his pleasure. F. N. B. 164.

On the king, *ex gratia*, may issue a writ out of chancery to the mayor, bailiffs, &c. to discharge him, and choose another, where he does not dwell in the town, or cannot attend his office. F. N. B. 164 E.

Or, if he has not lands sufficient to answer for misconduct. Ibid.

If the statute be not made pursuant to the statute in any material part, it will be void: as, if there be not two parts sealed. Jon. 52.

By the st. 25 H. 8. 6. Bridg. 19.

Or, with the seal of the king and the party. Win. 84. R. M. 405.

If it be not before the mayor of the town appointed to be the staple. Dal. 78. Bridg. 19.

Though he alleges a prescription to take it, though this be evidence that it was appointed by the king to be of the staple. R. M. 405.

If it be before the attorney or deputy of the mayor. Per Don. Win. 83.

Or, before one bailiff, where there are two, for both make out one officer. Win. 83, 84.

If it be not enrolled. Win. 84.

So, by the st. 25 H. 8. 6. no mayor, &c. of staple shall take any recognizance,

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recognizance, unless between merchants of the same staple for merchandize of the same staple, lawfully bought and sold between them, on pain of 40*l*.

But the omission of a circumstance not material does not vitiate: as, if it does not particularize any day of payment; for then it shall be paid presently. R. cont. Jan 3. R. acc. per three J. Jan 52. Win. 83. 1 Ch. R. 28. Bridg. 19.

If it be inrolled, though not by the hand of the clerk. Win. 83.

If the party be not a merchant. Ibid.

So, the conusee may say, that the conusor came before the mayor of L. without saying any thing of the statute of Acton Burnell. R. Dal. 73.

So, a statute does not need a delivery, for it is matter of record. Cro. El. 494.

If a statute be void, a supersedeas of the extent may issue. Jon. 1.

Or, the party may be relieved by *assize quodam*. Jon. 22. R. Cro. El. 233. 355. Vide *Audita Querela*, (A).

If a statute be void, as for want of a seal, &c. be void as a statute, it may be used as an obligation. R. Cro. El. 355. 494. 544. Mo. 405. Gould. 137.

**(B) Recognizance.**

By the 25<sup>th</sup> H. 8. c. 6. the chief justice of B. R. or C. B. and out of term the mayor of the staple at Westminster, and the recorder of London, may take recognizances under the seal of the party acknowledging, and the seal which the king shall appoint, and the seal and name of the chief justice, &c. before whom acknowledged.

The king shall assign one in the city of London, who, by himself or deputy shall write and inrol the recognizance in two rolls indented; one to remain with the justice who took it, the other with the writer.

And at the request of the creditor, his executor or administrator, shall certify the recognizance under his seal into chancery; on which the conusee, &c. shall have like process, execution, and advantage, as on a statute staple. Vide, for this, Lat. 430.

But it is sufficient, if it be found by *verdict*, that B. recognizance se *verdict* 200*l*. without saying by obligation, or under seal, or *assiduum* *formam statuti*; for it shall be intended in a verdict of *any* jury. 1 Co. 65. b.

Vide 8 C. 1. c. 25. 3. Vide *other recognizances*, vide in *Obligation*, (K).

**(C) In what manner a statute of recognizance binds.**

A statute of recognizance is a present duty.

If a statute, recognizance, or *eligui* be extended, a reversion is left in the conusor. Co. L. 22. h.

So, if one statute, &c. subsequent to another, be extended, the conusor has an interest in the nature of a reversion. Semb. per Ventris, 2 Vent. 226. Vide post, (K—F).

And if both the statutes are extended and assigned to the same person, the prior interest will be merged. 2 Vent. 227. Vide *Surrender*.

**(D) C.**

**(D) Execution upon a statute or recognizance; in what manner sued.****(D 1.) Before the mayor, &c.**

By the *st. de Act. Burn.* 11 Ed. 1. *et de Merc.* 13 Ed. 1. if the debtor does not pay, &c. the creditor shall bring his obligation to the mayor, &c. who shall incontinent cause the moveables of the debtor, to the amount of the debt, to be sold and delivered to the creditor by the praisement of honest men, and the king's seal shall be put to the sale, &c.

And if the mayor finds no buyers, he shall deliver the said moveables to the creditor at a reasonable price, &c.

And the mayor may cause the body of the debtor (if lay) to be committed to the prison of the town till he agree the debt.

And therefore the mayor may make execution, where the conusee lives, and has lands and goods within his jurisdiction. *F. N. B.* 131. D.

**(D 2.) Out of chancery:—How the recognizance shall be certified.**

By the *st. Act. Burn.* 11 Ed. 1. & *Merc.* 13 Ed. 1. if the debtor have no moveables, of which the debt may be levied, or cannot be found within the jurisdiction of the mayor, he shall send the recognizance under the king's seal into chancery, and the chancellor shall direct a writ to the sheriff to seize the moveables, or the body of the debtor, (if lay,) and make him agree the debt in the same manner as the mayor, if he had been in his power.

So, by the *st. de Merc.* 13 E. 1. if the debtor agree not the debt in a quarter of a year, by sale of his goods and lands, all his lands and goods shall be delivered to the merchant by reasonable extent, to hold till the debt be levied.

By the *st.* 27 Ed. 3. 9. the quarter of a year is ousted; but execution shall be on a statute-staple: as, on a statute-merchant.

And therefore, upon a statute-staple or merchant, if execution cannot be made within the staple, the recognizance shall be certified by the mayor into chancery under his seal. *F. N. B.* 130. C.

And upon a statute-merchant a *capias* shall issue out of chancery, returnable in B. R. or C. B. 2 Vent. 326. *F. N. B.* 130. G. Cro. Car. 451.

Though a *capias* upon a statute-staple shall be returnable in chancery only. *F. N. B.* 131. D. Cro. Car. 451.

So, a certificate ought to be made under the seal of the deputy for sealing obligations of statutes. *F. N. B.* 130. F.

If the first certificate omits part of the obligation, whereby the conusee cannot have execution, upon affidavit a writ shall go to the mayor to make another certificate. *F. N. B.* 132. B.

So, if the chancellor die, or be removed before the obligation upon the first certificate be delivered into court, if the name of the chancellor be mentioned. *F. N. B.* 132. B.

If the mayor, &c. refuse to certify, the conusee may have a writ to him to make the certificate. *F. N. B.* 130. c. 131. D.

And

And if he still refuse, he shall have an *alias*, *pluries*, and attachment. F. N. B. 130. D. 244. E.

So, a recognizance upon the st. 23 H. 8. 6. shall be certified in the same manner by the clerk of the inrolment, as a statute-staple by the mayor. Lut. 430.

But if a recognizance was certified before, it ought not to be certified again, without a special writ for that purpose, upon an affidavit that execution never was sued. F. N. B. 130. D.

So, execution in other manner than the statute directs will be void: as, if a *capias* issues out of C. B. without a certificate into chancery, &c. 2 Vept. 326.

So, if the conusee in a statute-merchant dies after a certificate and a *capias*, upon which the conusor is returned *non inventus*, the executor of the conusee shall not have an *extendi facias*, but must have a new certificate and *capias*. Cro. Car. 451.

So, after an extent sued upon a statute-staple, if the conusee, &c. die, the executor must begin *de novo*. Per three J. Cro. cont. Cro. Car. 451.

### (D 3.) Execution out of chancery:—By *levari*.

After the recognizance certified into chancery, if the recognisor be an ecclesiastical person, a *levari facias* shall be awarded to levy the debt of his moveable goods; for his body shall not be taken. F. N. B. 131. D. Reg. 298. b. 300. F. N. B. 265. D. 266. A.

If part of the debt be levied by *levari facias*, an *alias levari facias* may issue for the residue. Reg. 299. b. F. N. B. 265. H.

A *levari facias* against a clerk may be directed to the sheriff, if he has a lay-fee; otherwise, it shall be to the bishop of the diocese, where his benefice lies. F. N. B. 266. A. B.

Or, if he has benefices in several dioceses, there may be a writ for part to one bishop, and another for the residue to the other bishop. F. N. B. 266. A.

And when the bishop's power was taken away, his tythes might be taken by the sheriff upon an *elegit*. Hard. 65.

So, by the common law upon a recognizance in chancery, a *levari facias* lies within a year against the recognisor, though lay, for the money mentioned in the recognizance *de terris et catallis levand*. F. N. B. 265. D. Reg. 298. h.

But after a year he must have debt upon a recognizance at the common law; and now by the st. W. 2. 45. a *scire facias*. Reg. 298. b.

And in lieu of a *levari facias*, by the st. W. 2. 18. he shall have an *elegit*. Reg. 299. a.

If the sheriff does not execute or return the *levari facias*, there shall be an *alias*, *pluries*, and upon that an attachment against the sheriff. F. N. B. 265. F.

### (D 4.) By *capias si laicus*.

If the recognisor be a layman, a *capias si laicus* shall be awarded against him out of chancery; which, upon a statute-staple shall be returned in chancery only. F. N. B. 131. D.

The *capias* upon a statute-merchant may be returned in B. R. or C. B. F. N. B. 130. H.

So, a *capias* upon a recognizance before a chief justice, &c. by the st. 23 H. 8. shall be returned in chancery. Lut. 430.

If a man be in prison upon a statute-merchant, he shall have sustenance with bread and water out of his goods. F. N. B. 133. C.

And if the mayor or sheriff refuse it, a writ shall be directed to him for that purpose. Ibid.

(D 5.) By *extendi facias*.

Upon a statute-staple, the *capias si laicus* also commands the sheriff *quod omnia terras et catalla, &c. per sacramentum, &c. juxta verum valorem extendi et appreciari faciat, et prædicto* (the conusee) *liberari, &c.* F. N. B. 131. D.

Upon a statute-merchant, after the *capias si laicus* returned, an *alias capias* issues, reciting the first writ and return, which also commands *quod corpus, &c. in prisena custodiri faciat, ita quod per unum quarterium anni vivat de suo, et habeat omnia bona et terras deliberat. ut per se et suos de debito satisfaciat, et si non, &c. tunc omnia bona, terras et tenementa* (to the conusee) *liberari per rationabile pretium et extent. tenend., &c.* Reg. Jud. 8.

And afterwards a *pluries capias* to the same effect. Reg. Jud. 9.

If upon the first *capias si laicus*, the sheriff commands the bailiff of a liberty, who arrests the conusor, an *alias capias* goes only to take the goods and lands. Reg. Jud. 68. a.

And if all the goods and lands are not taken upon the first writ, there may be another writ for the other goods and lands, reciting the first. Reg. Jud. 68. b.

[After an extent on a statute into one county, and a liberate returned and filed, the conusee may have an extent into another county, if the prayer for the second extent was entered at the time the first extent was taken out; otherwise, not. Str. 461. Fort. 373.]

[And the chancellor will give leave to enter the prayer *nunc pro tunc*. Ibid.]

If he has no lands but in a county palatine, the statute shall be transmitted thither out of chancery, to have execution. F. N. B. 132. A.

If he purchase lands after the acknowledgment of the statute, they also shall be extended. Win. 83.

After a writ of extent, the sheriff shall take the conusor, shall extend and appraise his lands and goods, and shall make return of the extent and appraisement to the chancery. F. N. B. 131. D. Vide Execution, (C 14.)

So, he shall extend a rent-charge, or other rent, though the statute speaks only of goods and lands. R. Mo. 32.

So, he may seise to be appraised, before inquisition found. R. Mo. 563.

The inquisition ought to find the certainty of the conusor's estate; for if it says, *quod fuit seisitus vel possessionatus*, it will be insufficient. Dy. 299. a. in marg.

So, if it finds, that the conusor is dead, *et tempore recognitionis fuit seisitus de manerio de B.*, without saying of what estate; for if he was seised for life, or in tail, the land was not extendible after his death. Dy. 299. a.

If

If it finds, that he was possessed of a term of such a date, &c. which is mistaken, it will be bad. R. Cro. El. 584.

Or, for a term *diversorum annorum adhuc ventur.*, without showing the commencement or time of the term. R. 4 Co. 74.

If it finds, that he was seised of a tenement, it is bad, without showing how many houses, lands, &c. Mo. 8.

But an inquisition need not find a certainty, of which it cannot be informed; and therefore, if it finds the possession of a term *adhuc ventur.*, it is sufficient, though it does not say when it commenced, or for how many years. R. Cro. El. 584. Acc. upon a *feri facias*, but cont. in an extent. 4 Co. 74.

(D 6.) Liberate.

After an extent returned, a liberate shall go to the sheriff, reciting the *extendi facias* and return, and commanding, that he deliver the goods and lands to the conusee, *si per extantum et pretium illa habere voluerit*. F. N. B. 131. D. Lut. 432.

Till a liberate the land is not vested in the conusee. Dy. 67. b. Jon. 90.

But after a liberate awarded, the conusee may enter without delivery of the possession by the sheriff. Per three J. Gawdy cont. Cro. El. 463.

And the execution will be good, though the liberate be not returned. Semb. 1 Leo. 280. 2 Leo. 13. Dub. Godb. 82. Acc. 1 Rol. 737. l. 55. R. 4 Co. 67. a.

And if it be returned, the conusee shall be estopped to say, he had not possession. R. Sal. 563.

But a conusee, upon a statute-staple or merchant, may pray that the extendors shall take the land at the value extended. Co. L. 290. a.

So, a conusee upon a recognizance by the st. 23 H. 8. 6. Co. L. 290. a.

But not tenant by *elegit* upon a judgment or recognizance in court. Co. L. 290. a.

Nor, in execution upon a recognizance by bail. 2 Cro. 13.

Nor, in execution by *elegit* upon a recognizance in chancery. R. cont. 2 Cro. 13.

The conusee may pray, that the extendors shall take the land at the value extended, any time before his acceptance of the land. Yel. 55. At the day of the return of the writ. R. 2 Cro. 13. Mo. 753.

Though the conusor dies before the return, and his heir is in ward to the king. R. Yel. 55.

But after agreeing to the extent, the prayer is too late. 15 H. 7. 15. b.

As to an extent upon an *elegit*, vide in execution, (C 14.)

As to the suit of the king, vide in execution, (B 3, &c.)

(D 7.) Re-extent:—When allowed.

By the st. 32 H. 8. 5. if lands delivered in execution on a judgment, statute, or recognizance, shall be evicted without fraud or default of the tenant, who holds them in execution, before the debt and damages are wholly levied, the recoverer or conusee may have a *scire facias* against the person on whom the execution was first sued, his heirs, executors, or assigns, of lands then liable, returnable in the same court forty days

after the *teste*; and if the defendant makes default, or shows not cause, the chancellor, or justices of the court where the *scire facias* is returned, shall make a new writ of the like nature of the former execution for levying the residue of the debt.

So, if the conusee after a liberate enters, as he may; for that is tantamount to a delivery in execution. Co. L. 290. a.

If a disseisor enfeoffs the king, who grants to A., and afterwards grants the seigniority to B. who acknowledges a statute, upon which the seigniority is extended, and the land escheats, and then the disseisee recovers; the conusee shall have a re-extent, though the land was not delivered in execution, but the seigniority. Co. L. 290. a.

So, a conusee of a recognizance by the st. 23 H. 8. 6. if he be evicted, shall have a re-extent. Ibid.

So, the executor or administrator of a recoverer, or conusee, shall have a re-extent upon conviction. Ibid.

If the judgment be removed into B. R. by error, and affirmed there, he shall have a *scire facias* out of that court. Ibid.

So, if the first extent or inquisition be insufficient, he may have a new extent. Co. L. 290. a. Dy. 299. a.

[Vide 8 G. 1. c. 25. s. 3.]

#### (D 8.) When not.

But if by the eviction the party is not totally ousted of his remedy for the residue of his debt, there shall not be a re-extent: as, if a part only be evicted. Co. L. 289. b. 2 Cro. 338.

If all but one acre be evicted; for if he has a remedy *in presenti vel futuro* for the whole or part of the debt, he shall not have a re-extent. Co. L. 289. b. 4 Co. 66. a.

So, if he, who extends, be ousted by a subsequent extent upon a prior statute, he shall not have a re-extent; for after the former extent satisfied, he who extended first shall have it again. Co. L. 289. b. R. 4 Co. 66. a. Fulwood.

Or, if he be ousted by a woman who claims dower. Co. L. 289. b. R. 4 Co. 66. a.

Or, by a lessee for life or years upon a lease made by the conusor before the statute. Co. L. 289. b.

Yet, by the st. 8 G. 25. if before or after filing the liberate, it be made appear to the chancery that sufficient has not been extended or levied, &c. or any lands, &c. be evicted, the court may award a re-extent, one or more, and a liberate thereon.

So, after full satisfaction upon an extent returned and filed upon record, there shall not be a re-extent. Co. L. 290. a.

So, after an extent filed, there shall not be a re-extent, though several lands are omitted. 1 Sid. 356.

So, in no case shall there be a re-extent, except where the first extent was void. 1 Sal. 39.

#### E) What interest the conusee shall have.

By the st. de Marc. 13 Ed. 1. the conusee shall have seisin of all the lands, &c.

And by the st. 27 Ed. 3. he shall have an estate of freehold, &c.

And

And therefore he has *quasi*, the freehold of which he may maintain an assise. 2 Vent. 327.

So, the conusee may have *quasi* a reversion; and if there was a prior lease, may distrain or have debt for the rent. 2 Vent. 328. R. 2 Cro. 424. 477. Vide ante, (C.)

And a conusee must attorn to a grant of the reversion, as a tenant for life or years. 2 Vent. 328.

So, if a rent be extended, he may avow a distress for rent. Dy. 105. b. Dal. 34.

But a conusee, in debt for rent, must show the extent and inquisition returned upon it; and it is not sufficient to say, that it was delivered to him by extent. R. 2 Cro. 569.

So, a conusee shall hold by virtue of his first extent till the debt be satisfied, though part be evicted for life or years, or by a former extent, after such estate so evicted is determined. R. 4 Co. 66. b.

Till the debt with costs be satisfied. 15 H. 7. 15. b.

So, a conusee may assign his interest. 4 Co. 66. Skin. 263. Vide Assignment, (A.)

### **(F) How his interest shall be determined.**

But the interest of the conusee in the land determines by his release of the debt. 2 Vent. 327.

So, a release to him, by him in the reversion, merges his interest. 2 Vent. 327.

So, if the conusee purchases part of the inheritance, all his interest is merged. 2 Vent. 327. 1 And. 266.

Or, takes a lease for years of the reversion after an estate for years. R. Pal. 272.

And thereby his interest is suspended during the years. R. 2. Cro. 477.

So, he may surrender to him in the reversion. Vide Surrender, (F.)

Or, forfeit his estate by a feoffment, &c. 2 Vent. 328. Vide Forfeiture, (A.)

So, if a fine be levied of land after a statute extended, and five years passed, the interest of the conusee will be barred by such fine and non-claim. 2 Vent. 329. 332. Vide Fine, (I 2, 3.)

If a conusee purchases or takes a lease, &c. of part of the estate extendible, his interest, by reason of the statute, is extinguished so entirely in the land purchased or demised, that his extent of it is void, and a second conusee may extend. R. Pal. 272.

So, the interest of the conusee shall be determined by satisfaction acknowledged upon record of the statute. 2 Vent. 336.

So, by satisfaction from the profits according to the extended value. 2 Vent. 325.

Or, by accidental profits.

But an extent shall not be determined as to goods or land by escape of the conusor. R. 1 And. 266.

Nor, by purchase of parcel of the lands, which the conusor had at the time of the recognizance or statute acknowledged. R. 2 And. 171.

**(G) Remedy if the conusee be satisfied.**

If the conusee be satisfied his debt, by any accidental profit, or by perception of the profits, the conusor shall have a *scire facias* against him *ad computandum*. 4 Co. 66. b. 2 Vent. 338.

And upon such *scire facias* the conusee shall account according to the extended value, and not according to the real value.

And if, by the extended value, the conusee be satisfied, the conusor shall have judgment.

Or, if the conusor pay all that remains due upon the account, with damages. 2 Vent. 338.

So, if the conusee be satisfied by perception of the profits, though not by the extended value, the conusor shall be aided in equity; but shall pay the costs and damages which the conusee sustained, though they exceed the penalty of the original debt. 2 Vent. 338. R. Hard. 136.

And by a bill in equity the conusor shall compel the conusee to account according to the real value by him received. 2 Vent. 338. Hard. 136.

But the conusor cannot enter without a *scire facias*, though by effluxion of time the debt and damages may be intended to be satisfied according to the value of the lands; for the conusee shall hold, till not only the debt and damages, but also his costs, labour, and expences are satisfied, which ought to be ascertained by the court. R. 4 Co. 67. b.

So, no one shall have a *scire facias* but the conusor; and therefore if the conusor, after the recognizance, grants a rent-charge, and the conusee be satisfied, the grantee may distrain, and in replevin it may be tried, whether satisfied or not. R. Jon. 456. Cro. Car. 598.

Vide more concerning Statute-Staple in Dett, (A 3.) — *Enfant*, (B 4.)

**STEWARD.**

Vide *COPYPOLD*, (C 5. — F 3. — R 5, &c.) — *JUSTICES OF THE PEACE*, (D 7.) — *LEET*, (M 1.)

**Lord high steward.**

Vide *OFFICER*, (E 4.)

**Steward of the king's household.**

Vide *COURTS*, (H).

**[STOCK.]**

[Stock is not considered as money; not, therefore, within the meaning of a contract to enable it to recover money. 1 East, 1.]

[After an actual tender and refusal, the sale to a third person (to found

found the action for (not accepting stock) may be *instante* on the same day. 1 Smith, 420.]

[Actual transfer of stock to another before action brought, is essential to its maintenance. 4 East, 607. 1 Smith, 293.]

[The measure of damages, in an action for not replacing stock, is the price stock bears at the time of trial, if exceeding what it bore at the appointed day: if less than the latter price. 2 East, 211. Id. 213.]

[But special damages for the loss of a profit might, but which it appears he would not have made, are not recoverable. 2 Taunt. 257.]

[The stock-jobbing act is rather remedial. 2 Mars. 124. 6 Taunt. 419.]

[Jobbing in omnium is within it. 7 T. R. 630.]

[Sale by a broker of stock possessed by his principal, without disclosing his principal's name, is not. 8 T. R. 610.]

[Nor is a contract on a loan raised by the sale of stock, to transfer an equal quantity, though party is not possessed of it. 8 T. R. 162.]

## STYLE.

### Style of a court.

Vide COPYHOLD, (R 8.) — COURTS, (P 6.)

### King's style.

Vide ROY, (B).

## STRANGER.

[The plea in denial, even of an indenture, is *ne lessa ne dona*, and the like. 2 Taunt. 278.]

Vide FINE, (I 2.)

### Act of a stranger.

Vide ABATEMENT, (H 54) — CONDITION, (L 14.)

## [STRATFORD CORPORATION.]

[It is by prescription. 14 East, 348.]

## SUBJECTS.

Vide PARLIAMENT, (L 11.) — PREROGATIVE, (C 1, &c. — D 34, 35.) —  
TRADE, (A 5, &c.) — WAR, (B 6, 7.)

## SUBMISSION TO A WARD.

Vide ARBITRAMENT, (D 1, &c.)

B b 4

**SUBORNATION.**

Vide JUSTICES OF THE PEACE, (B 103. 105.)

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**SUBPŒNA.**

Vide CHANCERY, (D 1.)

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**SUBSIDY.**

Vide PARLIAMENT, (H 13.)

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**SUBSTRACTION OF TYTHES.**

Vide PROHIBITION, (G 7.)

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**SUCCESSION.**

Vide BIENS, (D 1.)—FRANCHISES, (F 16.)

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**SUGGESTION.**

Vide GRANT, (G 9.)—PATENT, (F 2.)—PROHIBITION, (H 2.)

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**SUIT.**

**Privilege of suit.**

Vide ATTORNEY, (B 17.)—DETT, (G 11.)—LONDON, (L 3.)—PRÆ-  
ROGATIVE, (D 85.)—PRIVILEGE, (C 1, 2.)

**Continuance of suit.**

Vide PLEADER, (V 1.)

**Former suit depending.**

Vide CHANCERY, (I 1.)

**Surceasing of suit.**

Vide ACTION UPON THE CASE UPON ASSUMPSIT, (B 1.)

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**SUIT OF COURT.**

Vide COPYHOLD, (K 13. 16, 17.)

**Wotory for suit.**

Vide TEMPS, (G 14.)

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**SUMMONS.**

Vide JUSTICES OF THE PEACE, (C 2.—D 3.)—PARLIAMENT (C).—  
PROCESS, (D 1. 9.—E 1.)—SEWERS, (C 6.)

**Sum.**

**Summons and Severance.**

Vide ASSISE, (B 10.)

**SUNDAY.**

Vide TEMPS, (B 3.)

**SUPERSEDEAS.**

[Rule as to the time of filing and entry of committiturs against prisoners. K. B. East, 41 Geo. 3. 1 East, 410.]

[The committitur must be filed the same term as the marshal's acknowledgment. 10 East, 46.]

[If a committitur is not entered on record within two terms, the prisoner is entitled to his discharge. 3 Burr. 1841.]

[If a judgment against two be affirmed with costs on error, brought by one alone, whereupon the other being a prisoner, is charged in execution for the amount of the original judgment, and the costs in error (to which last he is not liable) the court will allow the committitur to be amended, since there is something to amend by, namely the original judgment. 2 T. R. 737.]

[A second committitur in execution for the same cause, before the first has been duly discharged, is irregular. A notice by the party that he has abandoned the first, is the proper mode of discharging it. 1 T. R. 227.]

[A prisoner in custody of the sheriff shall be discharged on common bail for want of declaring in due time, the same, as if in custody of the marshal. 3 Burr. 1448.]

[In C. B. the defendant is not supersedeable till the end of the term, after that in which the process is returnable. 2 Blk. 1242.]

[There must be exceptions to the literal meaning of every rule, where the letter would work an injustice, or contradict the spirit of the rule: and therefore the court refused to discharge out of custody for want of proceeding against a prisoner within two terms where there was a mistake occasioned by two being of the same surname. Loft. 274.]

[A defendant who surrenders himself in discharge of his bail, shall be discharged for want of being charged in custody within two terms. 3 Burr. 1787.]

[While a treaty subsists between the plaintiff and the defendant; a prisoner, the plaintiff is not obliged to declare against him within two terms. 3 Wills. 455. 2 Blk. 918.]

[A plaintiff may show for cause against a supersedeas issuing, that the defendant has sued out a writ of error before the end of the two terms. 2 Wills. 380.]

[A defendant in custody is supersedeable, if final judgment is not signed within three terms, inclusive after declaration delivered. 2 Blk. 759.]

[A prisoner in execution is not supersedeable, on the ground that no judgment was docketed and entered up in the roll at the time of charging him. 2 B. & P. 163.]

[A sur-

[A surrender in discharge of bail in vacation after verdict, is considered with reference to the rule for charging in execution, as a surrender, not of the preceding but subsequent term, therefore the plaintiff has, until the end of the term following, the subsequent term for charging in execution. 6 T. R. 777.]

[The rule of K. B. Hill, 26 Geo. 3. directs that a prisoner shall be charged in execution within two terms next after trial had, or final judgment obtained, the term of the trial or judgment to be one. The words "final judgment," mean judgment without a trial; so that if a trial has been had, the two terms are reckoned from that of the trial and not from that of the judgment. 4 East, 349.]

[Notwithstanding the allowance of a writ of error, a prisoner may be charged in execution. 1 B. & P. 292. see (h) pl. 2.]

[Final judgment being obtained against a prisoner in Michaelmas term, the plaintiffs being then bankrupts, held that the assignees could not charge him in execution in the Hilary term succeeding, being prevented by defendant's plea to their *scire facias*. 2 Wils. 378.]

[One of two prisoners sued jointly, who has suffered judgment by default, is not supersedeable as for a non-compliance with the rule to proceed to trial or judgment within three terms, where the plaintiff within that time, proceeded to trial against the other, and thereupon assessed damages against the former. 13 East. 167.]

[If on a judgment in K. B. against two, one alone brings error, the writ, nevertheless, moves the record, so that no execution can go against the other; hence if he is a prisoner, he need not, for he cannot be charged in execution until the record is remitted. 2 T. R. 737. see *supra* (g) pl. 3.]

[A plaintiff suing out a commission of bankrupt against a defendant in execution is no ground at law for discharging him out of custody. 1 B. & P. 302.]

After the lapse of a reasonable time from the death of the plaintiff, and no probate or administration granted, the defendant in execution will be discharged, on notice to the plaintiff's family, and no cause shown. 1 B. & P. 176. 2 N. R. 240.]

[By rule of K. B. 2 Geo. 1. unless the plaintiff proceed to trial or judgment against a prisoner within three terms, he is entitled to be discharged. He cannot apply until the expiration of the third term. 4 T. R. 664.]

[Where a prisoner is entitled to be superseded, he may apply for his discharge at any time; where he seeks to be discharged upon the ground of an irregularity in the proceedings against him, he must, like every other defendant, apply promptly. 1 T. R. 191.]

[The rule that a prisoner once supersedeable is always so, means so long as he remains in the same custody and under the same process. If, therefore, a prisoner on *mesne* process is supersedeable for any irregularity, and having an opportunity neglects to insist upon it, until after he has been charged in execution, he waives his right. 1 T. R. 591.]

[A prisoner supersedeable from irregularity of proceeding, must object, in the first instance; hence if it consists in not having filed a bill in due time, he waives the objection by afterwards pleading. 1 East, 77.]

[After a prisoner has obtained a supersedeas, all subsequent proceedings

## **SUPERSEDEAS.**

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ings against him must be against persons at large, though he waives an irregularity in this particular by delay. 1 H. B. 251.]

[A supersedeas after judgment of a defendant in custody does not discharge the debt, and therefore cannot be pleaded to an action of debt on the judgment. 1 T. R. 273.]

[Rules and orders for a supersedeas must in C. B. be filed with prothonotaries upon their signing the writ. C. B. East, 57 Geo. 3. 7 Taunt. 551.]

Vide **AUDITA QUERELA**, (E 5.)—**CERTIORARI**, (E—F—H 1, 2.)—**CHANCERY** (4 Q).—**FORCIBLE ENTRY**, (D 28.)—**PLEADER**, (3 B 12.)

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## **SUPERSTITION.**

Vide **JUSTICES OF THE PEACE**, (B 15.)

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## **SUPERSTITIOUS USES.**

Vide **USES**, (M).

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## **SUPPLICAVIT.**

Vide **CHANCERY**, (4 R).—**FORCIBLE ENTRY**, (D 16, 17.)

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## **SUPPLY.**

Vide **PARLIAMENT**, (H 9, &c. — 17.)

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## **SUPPOSAL.**

Vide **PLEADER**, (G 13.)

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## **SUPPRESSION OF RIOTS, &c.**

Vide **FORCIBLE ENTRY**, (D 8.)—**JUSTICES OF PEACE**, (B 9.)

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## **SUPREMACY.**

Vide **PRÆROGATIVE**, (D 17.)

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## **SUR CONCESSIT.**

Vide **FINE**, (E 14.)

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## **SUR CONUSANCE DE DROÏT COME CEO, &c.**

Vide **FINE**, (E 9.)

**SUR**

**SURRENDER.****SUR CONUSANCE DE DROIT TANTUM.**

Vide FINE, (E 12.)

**SURETY.**

Vide BAIL, (E). — CHANCERY, (4 D 6. 15.)

**Surety of the peace.**

Vide FORCIBLE ENTRY, (D 16, &amp;c.) — JUSTICES OF PEACE, (B 5, 6, 7.)

**Surety of good behaviour.**

Vide JUSTICES OF PEACE, (B 5. 8.)

**SURGEON.**

Vide PHYSICIANS, (D).

**SUR GRANT AND RENDER.**

Vide FINE, (E 13.)

**SURPLUSAGE.**

Vide PLEADER, (C 28, 29. — E 12. — S 28, 29.)

**SURPRISE.**

Vide CHANCERY, (4 D 22.)

**SURRENDER.**

- (A) Surrender; what shall be, in fact. p. 381.
- (B) When without deed. p. 382.
- (C) When not. p. 382.
- (D) What estate may be surrendered. p. 382.
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[(K a.) Implication of.] p. 388.

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(M) When a charge revives by the voiding of a surrender. p. 390.

(N) Surrender; how pleaded. p. 390.

(A) Surrender ; what shall be, in fact.

A surrender is the resignation of a particular estate for life, or for years, to him in the immediate reversion or remainder. Co. L. 337. b.

A surrender shall be by express words, or by operation of law. Co. L. 338. a.

An express surrender does not require the word "surrender;" for any words tantamount are sufficient. 2 Rol. 497. l. 55.

As, if a lessee grants that the lessor shall have his land, or grants his land to him. 2 Rol. 428. l. 2.

Or, grants to him *totum statum suum*. 2 Rol. 497. l. 35.

Or, leases to him for his life. 2 Rol. 497. l. 15.

Or, says to him, I agree you shall enter into the land. 1 Leo. 280.

Or, I am content you shall have it. R. Cro. El. 488.

So, a surrender will be good in the absence of him to whom made, for his assent shall be presumed, if it does not appear to the contrary. Cont. per three J. Vent. acc. and the judgment of the three J. was affirmed in B. R. but afterwards reversed in parliament. 2 Vent. 199. &c. Sho. 297. 3 Mod. 297. 3 Lev. 284. Ca. Parl. 151.

[If a lease come into the hands of the original lessor, by an agreement between him and the assignee of the original lease, "that the lessor shall have the premises as mentioned in the lease, and shall pay a particular sum, over and above the rent, annually, towards the good-will already paid by such assignee;" this agreement will operate as a surrender of the whole term; and the sum mentioned in the agreement will be considered as a sum to be paid annually in gross, not as rent. 1 T. R. 441.]

[A deed executed between landlord and tenant reciting, "that it had been

been agreed that the tenant should quit and deliver up the premises, that a valuation of his effects upon the premises should be made, which in the mean time were to be assigned, and which accordingly were assigned to trustees for the landlord," operates as a conditional surrender only. 12 East, 134.]

What shall be a surrender in law, vide post, (I 1, 2.)

### (B) When without deed.

A surrender of an estate for life in land, by the common law, might be made without deed or livery; for nothing operates but the restoration of the particular estate to him in reversion or remainder. Co. L. 338. a. 2 Rol. 498. l. 23. 40.

Though it was originally created by deed. Co. L. 338. a.

So, A., tenant for life, reversion to B. for life, they might join in a surrender without deed; for it will be first the surrender of A. and afterwards of B. 2 Rol. 498. l. 20. R. 2 Rol. 20. Cro. El. 269.

So, a joint-tenant might surrender to his companion (admitting that he may surrender) without deed. 2 Rol. 498. l. 43. Vide post, (E).

So, a lessee for years might surrender by *parol*. R. 1 Vent. 242. 272.

[Lease by deed, for any number of years, may be surrendered without deed, by note in writing, without stamp-duty. 2 Wils. 26.]

[The acceptance of a new and valid lease, implies the surrender of a former. 4 Burr. 2210.]

### (C) When not.

But by the common law, an estate, which lay in grant, and could not be created without deed, could not be surrendered without deed. Co. L. 338. a.

As, a corody, rent, &c. 2 Rol. 498. l. 30.

An office. 1 Vent. 297.

So, if there be a feoffment to A. for life, remainder to B. for life, remainder in fee to C.; though the remainder to B. commenced without deed, it cannot be surrendered without deed. Co. L. 338. a. R. per three J. 2 Rol. 20.

So, a lessee for years of a manor could not surrender without deed. R. 2 Rol. 498. l. 35.

So, a corporation aggregate cannot make a surrender of their lands without deed. 10 Co. 67. b.

And now by the st. 29 Car. 2, 3. no lease, estate, or interest of freehold, or term of years, or any uncertain interest, not being copyhold, in or out of any manors, lands, &c. shall be surrendered, &c. unless by deed or note in writing, signed by the party so surrendering, or his agent thereunto authorized in writing, or by act and operation of law.

### (D) What estate may be surrendered.

A surrender regularly ought to be of a particular estate: as, of an estate for life or for years. 2 Rol. 494. l. 27.

So, tenant by statute-staple, merchant, or *elegit*, may surrender. 2 Rol. 494. l. 44.

So,

So, a devisee for so many years, till he receives so much money, though he has only a chattel and no estate in the land. 2 Rol. 494. l. 40.

So, if a lessee demises to his lessor for a less term rendering rent, he may surrender his reversion to his lessor, whereby the rent will be extinguished. 2 Rol. 494. l. 55.

So, if there be a lessee of a term to commence after the death of A., and a grantee of the inheritance makes a lease for 21 years, and then the lessee of the future interest assigns to the grantee of the inheritance, his interest will be emerged. R. Cro. 619.

So, a grant of the next avoidance will be surrendered by an acceptance of a grant of the next avoidance *de novo*. Semb. 1 Bul. 33.

So, tenant in dower, or by curtesy, may surrender, though their estate is created by law. Co. L. 338. a.

So, an estate of a thing, which lies in grant, may be surrendered to the terre-tenant, though it be an estate in fee: as, tenant in fee of a common, rent, &c. may surrender his interest to the terre-tenant. Perk. s. 585.

So, the tenant in a *præcipe*, or other real action, though he be seised in fee, may surrender his estate to the demandant without livery. 2 Rol. 494. l. 30.

So, the tenant in a *cessavit*. Qu. Perk. s. 585.

### (E) What not.

But regularly a tenant in fee cannot surrender his estate; and therefore the very tenant cannot make a surrender to his lord. 2 Rol. 494. l. 23.

Though he be the very tenant of the king. 2 Rol. 494. l. 25.

So, the discontinnee of tenant in tail cannot surrender to the issue in tail. 2 Rol. 494. l. 29.

So, a joint-tenant cannot surrender to his companion. 2 Rol. 494. l. 10.

So, a tenant at will cannot surrender properly. 1 Leo. 177, 178.

So, a right cannot be surrendered; and therefore a tenant for life being disseised; cannot make a surrender before entry. 2 Rol. 494. l. 49. Co. L. 338. a.

Nor, a lessee for years being ousted.

Yet if the lessor waives his possession, the lessee, before entry, may surrender to him. Perk. s. 603.

So, if the lessee enters and assigns to B., the assignee may surrender before entry; for the assignment gives him actual possession before entry. R. 2 Rol. 425. l. 15.

### (F) To whom it may be made.

A surrender ought to be to him who has the immediate reversion or remainder. Co. L. 337. b.

And to him who has the immediate reversion or remainder, a surrender may be, whether he has it in fee or in tail.

So, if he has it only for life. 2 Rol. 494. l. 12.

So, a lessee for years may surrender to him who has the reversion only for years. R. Cro. El. 302. Adm. 2 Vent. 327.

Though

Though the lessee be for several years, and the reversioner has it only for one year, or a less term. Per Poph. and Fenner, Cro. El. 302.

So, if a statute be extended, and afterwards there is another extent upon a later statute, the conusee of the former statute may surrender to him who has the interest in the last extent; for he has *quasi* a reversional interest. Per Vent. 2 Vent. 327.

And if the interest in both statutes comes to the same person, it amounts to a surrender of the former. Skin. 263.

If a lessee demises part of his estate to the lessor, he may surrender the other part; for the reversion of that remains in the lessor. 2 Rol. 494. l. 54.

So, if a lessee for thirty years demises for ten years, both the lessees joining in a surrender, it will be good; for it shall be construed the surrender of the lessee for thirty years first, and then of the lessee for ten years. Pl. Com. 541. a.

So, a surrender to an infant will be good; for his assent shall be presumed till a disagreement appears. R. 2 Vent. 208. Ca. Parl. 151.

### (G) To whom not.

But a surrender to him who has not any reversion in him, is void: as, if a reversion be granted to B., a surrender to him by a lessee before attornment, (when the reversion does not vest till attornment,) is void. Adm. Cro. El. 808.

So, if a lessee for years to commence at Michaelmas surrenders before Michaelmas by deed, it is void; for till Michaelmas the lessor had not any reversion, in which it could merge. Co. L. 338. a. Vide post, (I l.)

So, a surrender cannot be made, if the reversion or remainder be not immediate: as, if a lessee for thirty years leases to B. for ten years, B. cannot surrender to the first lessor. Pl. Com. 541. a.

If a statute be acknowledged to A., and another to B., and a fine levied by him in the reversion to A., his estate is not merged; for the *mesne* interest of B. prevents the surrender of *merger* of his estate. Skin. 263.

So, a surrender to a lessor, who disagrees to it, will be void. Mar. pl. 10. 2 Vent. 207.

### (H) What will not be a surrender.

So, if a lessee, &c. reserves to him any part of the estate, it is not a good surrender: as, if he grants all his term to the lessor, except the last year, month, or day. R. 2 Rol. 497. l. 30. 498. l. 5. 3 Bul. 203, 204.

Or, leases to his lessor for his life; for he has a possibility to have it gain. 2 Rol. 497. l. 5. 10.

So, if the lessee agrees with the lessor by parol, that he shall have it rendering so much rent, it is not a surrender; for it appears that rent was intended to be reserved, which cannot be by parol upon a surrender, and, therefore, it will be only a lease at will. R. 251. b. 2 Rol. 497. l. 45. 1 Leo. 177.

So,

So, if the lessee demises to the lessor and the heirs of his body, it will not be a surrender; for a special occupant is appointed. 2 Rol. 497. l. 37.

So, if the lessee surrenders to the lessor to the use of another, the use cannot arise upon the estate extinguished by the surrender. R. Pal. 359.

So, if the lessee permits the lessor of a manor to hold a court there, and says generally in his presence, I have nothing to do here; it is no surrender. Semb. 1 Leo. 280. 2 Leo. 49.

Or, if the lessor says, I will have such a chamber, and the lessee agrees, and the lessor puts his goods there; it is no surrender of that part, but only a permission to put his goods there. 3 Leo. 224. Vide post, (I 2.)

So, if the lessee delivers his lease to A. to deliver with all his estate to the lessor, and A. does accordingly; for he cannot make a surrender by attorney. R. Cro. El. 488.

So, if a lessee for years leases to B. for a less term, who regrants or releases to the first lessee, it is no surrender; but the first lessee shall have it for all the years. Adm. Cro. El. 302. R. Cro. El. 173.

So, if a lease be to A. for ten years, remainder to B. for twenty years, and B. releases all his right and estate to A., he shall have it for thirty years. Co. L. 273. b.

## (I) Surrender in law.

### (I 1.) What shall be.

So, it shall be a surrender by operation of law, if a lessee for life enfeoffs him in the reversion in fee; for his estate will be merged. 2 Rol. 496. l. 42.

[A release from tenant for years to the reversioner operates as a surrender. - Ld. Raym. 403.]

So, if he grants to him *totum statum suum*. 2 Rol. 497. l. 35.

So, if he enfeoffs husband and wife, seised of the reversion in right of the wife. 2 Rol. 496. l. 49.

So, if lessee and lessor join in a feoffment, it will be the surrender of the lessee and the feoffment of the lessor. Pl. Com. 140. b.

So, a feoffment by a lessee for life to him in the reversion is a surrender; though the reversioner be an infant. 2 Rol. 496. l. 42.

So, if lessee for life demises to him in the reversion, for the life of the lessee, it will be a surrender; though there be a possibility of an occupant. 2 Rol. 497. l. 15.

Or, for the lives of the lessor and lessee; for it can never revert to the lessee. R. 2 Rol. 497. l. 17.

So, if a lessee for life or for years accepts a feoffment from him in the reversion or remainder, that amounts to a surrender of his estate. 2 Rol. 495. l. 25.

So, if there be a feoffment to A. to the use of himself for life, and afterwards to A. and his heirs, and A. by parol, without deed, but upon an agreement that the feoffor shall have it again, makes livery to him upon the land; this amounts to a surrender of his estate, and also to a feoffment. R. Dy. 358. a.

So, if lessee for life accepts a lease from the lessor, it will be a surrender. Al. 59.

Though the new lease be only for years. Al. 59.

So, if lessee for years accepts a new lease from his lessor, it will be a surrender in law; for this affirms him able to make a lease. R. Pl. Com. 106. a. 107. b.

Though the new lease be for a less term. R. Dy. 140. b. 2 Rol. 495. l. 53. 2 Cro. 84.

Or, by parol, when the first lease was by indenture. Dy. 140. b. 2 Rol. 496. l. 3.

Though the new lease commence at a future day, it will be a surrender immediately. R. 5 Co. 11. b. Cro. El. 522. R. 2 Rol. 496. l. 5. R. Mo. 636. 2 Cro. 84. Per three J. Poph. 9.

Though the new lease be defeazable. 2 Rol. 495. l. 40.

Or, upon condition to be void, upon such an act which is afterwards done. Pl. Com. 107. b.

So, if he accepts a lease at will. Mo. 637.

So, if a lessee for years, to commence at Michaelmas, before Michaelmas accepts a new lease to commence immediately; it will be a surrender of the former lease, though it was only a future interest. Co. L. 338. a.

So, if before Michaelmas he accepts a new lease to commence also at a future day. Co. L. 338. a. D. cont. 2 Rol. 496. l. 10. D. cont. Dy. 58. a. Per Moile and Davers cont. but Prisot acc. 37 H. 6. 18. a. Bro. Surrender, 21. Acc. 10 Co. 53. a. 67. b. Acc. Cro. Car. 502. 1 Rol. 728. l. 40. R. Cro. El. 522. 605.

So, if a lessee accepts a new lease *de vestura terræ*, it will be a surrender. 2 Rol. 496. l. 20.

So, if he accepts a grant of common or rent out of the same land, to commence at a certain day within the term. R. 2 Rol. 496. l. 20. 25.

Or, a lessee for life accepts a grant of a rent, common, &c. out of the same land for life. R. 2 Cro. 177.

Or, a lessee accepts a grant of the custody of the same land. 2 Cro. 177.

So, if a woman, lessee, takes husband; acceptance of a new lease by the husband will be a surrender. 2 Rol. 495. l. 50.

So, acceptance of a new lease by parol by a corporation aggregate, which has a former lease, will be a surrender, though they cannot surrender without deed. 10 Co. 67. b.

So, if a lessee for years accepts a new lease from the guardian in socage. Semb. 1 Leo. 322.

So, if the grantee of an office accepts a new grant of the same office, it will be a surrender. Semb. 1 Vent. 297.

So, if a corporation sole leases to B., who is afterwards made head of the corporation, as a bishop, master of an hospital, &c. his term is merged; for he cannot have the term in his own right, and the freehold in another right. Co. L. 338. b.

So, if a woman, lessor, takes to husband the lessee for years. Co. L. 338. b. Semb. cont. 2 Cro. 275.

### (I 2.) What not.

But if lessee for life enfeoffs him in the remainder in tail, it will not be a surrender; for by the feoffment the remainder is divested. 2 Rol. 496. l. 45.

Or,

Or, joins in a fine with him in the reversion, or remainder; for each gives that which he lawfully may. Semb. Cro. El. 688.

So, if a lessee reserves any interest in himself, it is no surrender. Vide ante, (H).

So, if the lessor or reversioner enfeoffs the lessee for years, since the st. 27 H. 8. to the use of another, his term is not surrendered or extinguished; for by the statute the interest of feoffees is saved. R. 7 Co. 39. a.

Or, by lease and release conveys to the lessee and another, to the use of B. Dub. 2 Lev. 127.

So, if the lessee accepts a new lease, in trust for another. Semb. 1 Sid. 75.

So, if the new lease be void, acceptance by the lessee is no surrender. R. 2 Rol. 496. l. 45. Jon. 405.

So, if the new lease commences after the death of B., it is no surrender till B. dies; for he may survive the first term. R. 4 Leo. 30.

So, if a lessee accepts a grant of a thing consistent with the lease of the land, it is no surrender; as, if the lessee of a manor accepts the grant of a bailiwick, or to be steward of the same manor; for it is collateral. R. 2 Rol. 496. l. 30. Qu. Mo. 637. R. 2 Cro. 84. 176. Hard. 47.

Or, the lessee of a park accepts the grant of parker. R. 2 Rol. 496. l. 36. 2 Cro. 177.

Or, *à contra*. Cont. per two J. 1 Rol. 83.

If the lessee of an house accepts a grant of the custody of the same house. Hard. 47.

So, if the lessor grants a rent, common, &c. out of the land to his lessee, without saying at what time it shall commence, it is no surrender; but it shall be intended after his term. R. 2 Rol. 496. l. 16. 2 Cro. 177.

Or, leases to him all his lands in A. where the lands in the former lease are; for it shall be intended of all his other lands. 2 Rol. 496. l. 13. 2 Cro. 177.

Or, agrees that the lessee shall have part of the former lands and other lands for a less term, and that it shall not be a surrender. R. 1 Leo. 303. Cro. El. 173.

So, an agreement between the lessor and a stranger, that the lessee shall have a new lease, is no surrender. Cro. El. 173.

So, if the lessee gives licence to the lessor to make livery, it is no surrender. R. 2 Rol. 495. l. 35.

Or, to make a feoffment. Per Fitzb. Dy. 33. b.

Or, agrees that he shall make a feoffment. Dub. Dy. 33. b. 2 Rol. 495. l. 27. Mo. 11.

Or, be attorney to make livery for him. 2 Rol. 495. l. 37. R. Mo. 11.

So, if the king grants an office by patent acceptance of a new patent of the same office is no surrender of the first. R. Cro. Car. 197.

So, if the king makes a demise for years, acceptance of a new lease without recital of the former will be void, and is no surrender. Cro. Car. 198.

So, if husband and wife, seised for the life of the wife, accept a feoffment from the reversioner, it will be a surrender only during the coverture; for the wife, after the death of her husband, may waive it. Vide Baron and Feme, (R).

So, if a woman, lessee for years, takes an husband who accepts a new lease, and the wife survives. R. Mo. 637.

So, if a new lease be made to an infant, it is no surrender, if he does not agree to it at full age. Cro. Car. 502.

So, if an idiot, or *non compos*, makes a surrender, it will be void. R. Comb. 438. 468.

So, if a lessee surrenders part of the estate, it will be a surrender only for that part. 2 Rol. 498. l. 51.

If he accepts a new lease of part. R. 2 Rol. 498. M.

If a lessor leases *de novo* to his lessee and another, it will be a surrender only for a moiety. Dub. 2 Lev. 127.

If the lessee of a corporation aggregate be made the head of the same corporation, it is no surrender. Co. L. 338. b.

So, if the lessor takes in marriage a woman, lessee; for he may have the freehold in his own right, and the term in the right of another. Co. L. 338. b. R. Pl. Com. 418. b.

Or, if the lessee makes the lessor his executor. Co. L. 338. b.

### [(K a.) Implication of.]

[In ejectment the jury will be directed to presume the surrender of a satisfied term. *Secus*, one unsatisfied. 2 T. R. 684. 7 T. R. 2.]

[A surrender will be presumed if the beneficial occupation of the estate by the possessor may have induced a supposition that a conveyance of the legal estate has been made to the party beneficially interested; or when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance. 4 T. R. 682.]

[The surrender of a term cannot be presumed under twenty years, without circumstances. 5 Taunt. 170.]

[Possession of the deed, and non-payment of interest, are not circumstances in aid of the presumption. *Ibid.*]

[A surrender will not be presumed if it be a breach of trust. 8 East, 248.]

[A surrender will not be presumed where the title of the party for whom the presumption is required is a doubtful equity only, until a court of equity has first declared in favour of the equitable title. 8 East, 248.]

[If a lease be granted to the *cestuy que* trust of a lease, in consideration, as the grant states, of the surrender of the former lease; there is evidence whence a jury presume that the former lease was duly surrendered by the trustee. 6 T. R. 289.]

[Where neither justice, nor the interest of the owner of the inheritance, are to be answered by presuming the surrender of a mortgage term, it cannot be presumed, from a sum having been appropriated by the marriage settlement of a former owner to discharge it, against the express recognition of a subsequent owner of its existence, and conveyance by him as a security. 11 East, 478.]

(K b.) In

**(K b.) In what manner a surrender may be.**

A lessee may surrender upon condition ; and if the condition be broken, the particular estate shall be revested. Co. L. 218. b.

So, upon a surrender, reserving rent, though the rent is not good by way of reservation, yet it shall be so by way of contract. R. 2 Lev. 80. 1 Vent. 242. 272.

Though the surrender be by assignment, &c. by parol. R. 2 Lev. 80. 1 Vent. 242. 272.

So, if tenant for life joins in a feoffment or fine with him in the reversion, rendering rent to the lessee for life ; the rent will be good. Cro. El. 688.

So, a surrender may be made of land in the county of B. at a place out of the county. 2 Rol. 495. l. 5.

**(L) The effect of a surrender.**

**(L 1.) The estate is absolutely determined between the parties.**

If an estate be surrendered, the whole estate is determined without other ceremony.

And, as to the parties themselves, it will be determined to all intents. Co. L. 338. b.

And, therefore, if an husband, seised in right of his wife, leases for the life of B., which is a discontinuance, and afterwards B. surrenders his estate to the husband, the discontinuance is determined. Co. L. 338.

If A. mortgages his reversion in fee to the lessee for years, whereby his term is surrendered, and afterwards pays the money pursuant to the condition, yet his term shall be extinguished, and not revive. R. 3 Leo. 6.

**(L 2.) Or, for the benefit of a stranger.**

So, by a surrender the estate will be absolutely merged for the benefit of a stranger. Co. L. 338. b.

As if a bishop has a rent-charge in fee, and the terre-tenant enfeoffs him, whereupon the lord enters for mortmain, he shall have it discharged of the rent. Ibid.

If a reversioner makes a lease, grants a rent-charge, &c. and afterwards the lessee of the particular estate surrenders, the lease, or grant of the reversioner, takes effect immediately. Ibid.

If A. makes a lease to B. for life, rendering rent to him and his heirs, remainder to C., the reversion to himself, and afterwards grants the reversion to C. to whom B. attorns, yet C. shall not have the rent, but the heir of A. Co. L. 338. b.

So, by a surrender the estate will be merged, though it be to the disadvantage of him who assents ; as, if the reversioner grants a reversion for life to which the lessee attorns, and afterwards releases to the grantee and his heirs, though the lessee shall be now punished for waste, where he was dispunishable upon the grant of the reversion for life ; yet, be-

cause he has attorned to the grant, the estate of the grantee for life shall not have continuance. Co. L. 338. b.

(L 3.) But not to his prejudice.

But the estate shall have continuance notwithstanding the surrender, to avoid a prejudice to a stranger. Co. L. 338. b.

As, if a reversion upon the life of B. be granted with warranty, and afterwards B. surrenders, the grantee shall not have execution in value against the grantor, who is a stranger, during the life of B. Co. L. 338. b.

If tenant for life or years grants a rent-charge, common, &c. and afterwards surrenders; yet the rent, &c. continues. Co. L. 338. b.

(M) When a charge revives by the voiding of a surrender.

So a charge made before the surrender revives, if the surrender be avoided, against him, who claims paramount the surrender; as, if lessee for life grants a rent-charge and afterwards enfeoffs the grantee, and the lessor enters for the forfeiture, the rent revives; for the lessor claims paramount the feoffment. Co. L. 338. b.

So, if grantee for life of a rent accepts a lease of the land from him in the reversion, and afterwards the lease is surrendered, the rent revives. R. per three J. Bramston cont. Cro. Car. 101.

(N) Surrender; how pleaded.

If a surrender be by acceptance of a new lease, it is not good to say, that the lessee, being possessed by a former lease, the lessor demised to him, but that the lessee surrendered, and then the lessor demised, or that the lessor entered and demised. Semb. per Dy. pl. Com. 194. b.

So, regularly, he ought to plead, that he surrendered the estate and land. Cro. Car. 101.

So, regularly, he ought to show that the lessor assented to it, where the other party pleads or brings an action in disaffirmance of the surrender. 2 Vent. 207.

But the omission will be aided after verdict.

And it is not of necessity. Semb. 2 Vent. 207.

But if the party pleads a surrender of the demise aforesaid, it is sufficient. R. Cro. Car. 101.

So, he need not show that the lessor entered after agreement to the surrender. Ibid.

Vide more concerning Surrender in Bail, (Q 2, &c. — R 3.) — Fine, (E 11.) — Franchise, (G 2.) — Officer, (K 9.) — Patent (G).

**Surrender of a copyhold.**

Vide COPYHOLD, (F 1, &c.)

**SURREBUTTER.**

Vide PLEADER, (L).

SURRE-

SURREJOINDER.

Vide PLEADER, (I).

SURVEYOR OF HIGHWAYS.

Vide CHIMIN, (C 1, &c.)

SUSPENSION.

- (A) Suspension ; what shall be. *infra*.
- (B) What shall be an extinguishment. p. 392.
- (C) When by extinguishment of part, the whole will be extinguished. p. 393.
- (D) Dr, by suspension of part, the whole will be suspended. p. 394.
- (E) When there shall be an apportionment. p. 394.
- (F) Dr, a suspension only for part. p. 395.
- (G) When all the services, &c. remain, and are not apportioned, or extinguished. p. 395.

(A) Suspension ; what shall be.

If a seigniori, rent, or other profit *apprendre* out of lands, comes to him who has possession of the same land for a time, such unity of possession creates a suspension of the seigniori, rent, &c. for the time. Co. L. 313. a.

As, if A. be tenant for life, remainder to B. in fee, and the lord grants his services to A. in fee, they are suspended during the life of A. Lit. s. 560.

So, if there be lord and tenant, and the tenant grants his tenancy to A. for life, and then the lord grants his seigniori to A. in fee, the seigniori will be suspended during the life of A. Lit. s. 562.

So, if A. disseises the tenant, or the tenant grants to A. in fee upon condition, and then the lord grants to A. in fee, and afterwards the disseisee enters, or the tenant enters for the condition broken, the services revive, and are not extinguished, though A. had a fee; for he had not so perdurable an estate in the tenancy as in the seigniori. Co. L. 313. b.

So, if the tenant leases to the lord for life, or for years, or enfeoffs him upon condition, the seigniori is suspended. Co. L. 314. a.

Or, if the lord disseises his tenant, the seigniori will be suspended till the entry of the disseisee. Co. L. 314. a.

So, if the tenant marries a woman who has the seigniori, it will be suspended during the coverture. Sav. 21.

If A. seised of lands held of the manor of B. be attainted for high treason, and the king grants his lands to D., the rent payable to the manor of B., though suspended by the attainder, shall be revived and paid by the patentee. R. Ley. 1.

### (B) What shall be an extinguishment.

But if a man has as high and perdurable an estate in the seignior, rent, common, or other profit *apprendre*, as in the land, such profit *upprende* will be extinguished. Co. L. 313. a. Lit. s. 561.

As, if he who has a seignior, rent, common, &c. releases his estate or interest to the terre-tenant. Vide Release, (B 6.)

Or, the lands out of which a rent, &c. issues, come to the lord by purchase, descent, or other lawful means. R. Jon. 234.

If a manor, to which common for the lord and his copyholders belong, in the waste of the king and others, comes to the king by the statute of dissolutions, &c. the common of the lord in the waste of the king is extinguished; but not the common of the copyholders, nor the common which the lord himself has in the waste of others. R. Jon. 349.

So, if the land out of which a rent, &c. is granted, be evicted by an elder title, the rent will be extinct. Co. L. 147. a.

So, every customary payment or privilege for the profit of the lord will be extinguished by unity of possession in fee; as if the lord purchases the land held of him, all the services are extinct.

So, an heriot, fine, &c. due by custom upon death, alienation, &c.

A custom to be beadle to the lord, collector of his rents, &c. Bro. Exting. 14.

So, an easement; as, a way. R. Cro. EL. 300. R. 1 Rol. 935. l. 45.

Usage to repair fences between such and such closes. R. 1 Vent. 97. Ray. 192. R. Pal. 446.

So, a liberty of placing pipes for water, if the pipes are taken away during the unity. Pal. 446.

But things of necessity, and collateral, are not extinguished; as, a way of necessity, gutter, water-course, &c. R. Pal. 446. Jon. 145, 146.

So, extinguishment, or suspension by law, may be prevented in equity. Vide Chancery, (4 N 6. 8.)

[The nature of gavelkind lands is not affected by the lord's purchasing them. D. Per Wood, J. 11 H. 7. 25. b.]

[All things arising out of land, being part of the profits thereof, only are extinct, where the party entitled has as high an interest in the lands out of which the thing arises as exists in the thing to which it is annexed. Dav. 5. a.]

[Thus, a rent is extinguished by such an unity. D. Dav. 5. a. b. Per Townsend. J. 11 H. 7. 25. b.]

[A common, or a way. D. acc. 11. st. 4. 5. a. Bro. Extinguishment, pl. 11. Fitz. Extinguishment, pl. 4. R. acc. Noy, 119. D. acc. Poph. 170. Dav. 5. a. b. Dub. Ow. 121.]

[Except that a thing which must necessarily exist after the unity ceases, is not extinct.]

[Therefore

[Therefore a way of necessity is not extinct by such an unity. R. Cro. Jac. 170. 2 Sid. 39. 111. D. acc. Poph. 172. 3 Bulstr. 340. Latch. 154.]

[Or, a water-course. R. Poph. 166. 3 Bulstr. 339. Latch. 154. Noy, 84.]

[Or, a gutter. D. 11 H. 7. 25. b. Per Wood and Townsend. J.]

[Unless it is discontinued during the unity. D. Per Danvers, J. 11 H. 7. 25. b.]

[But things which are merely collateral to land, are not extinct by any unity. D. Dav. 5. b.]

[Therefore, a right to a warren upon land is not extinguished, though the person entitled to the warren is entitled to an interest in the land upon which the warren exists, equal to the estate in respect of which it is claimed. D. Dav. 5. b.]

[And a thing which, though it arises out of the profits of the land, and is payable only by the owner, is due in a personal respect, is not extinct by any unity. D. Dav. 5. b.]

[Therefore, an unity will not destroy the right to tithes. Ibid.]

[A right of way overland in respect of a house is destroyed by an unity of interest in the land, and the *terminus ad quem*, without the house. Vide Bro. Chimin. pl. 13.]

### **(C) When by extinguishment of part, the whole will be extinguished.**

If a man has a profit *apprendre* out of land against common right, and he purchases part of the land out of which, &c. the whole will be extinct; as, if the grantee of a rent-charge purchases parcel of the land; for the rent is entire, and issues out of every part of the land. Co. L. 147. b.

So, if a commoner of common appurtenant purchases part of the land out of which. Vide Common (L).

So, if a grantee of a rent-charge recovers part of the land by a feigned title; for he claims under the grantor. Co. L. 148. b.

So, if the conusee of a statute purchases part of the land of the conusor, the whole shall be extinct. Sav. 69. R. Jon. 445.

Or, if he disseises the conusor of part, he cannot take execution of the residue, till the disseisin purged. Jon. 445, 446.

So, if a thing be due by common right, by the act of him to whom due, the whole may be extinguished; as, if a tenure be by entire service, annual or casual, if the lord himself purchases part, the whole will be extinct. 6 Co. 1. b. R. 8 Co. 105. b. Co. L. 149. b.

If the lord releases his seigniori to part, the whole seigniori will be extinct. 6 Co. 1. b.

So, if the lord comes to part, partly by his own act, and partly by default of the party; as, if he recovers in a *cessavit*. R. 6 Co. 2. b.

So, if the lord comes to part by act of law, where another will have prejudice; as, if the lord by descent comes to the part of a joint-tenant, who holds by suit of court, the whole will be extinct; for by the st. Marl. the other joint-tenants shall have contribution. R. 6 Co. 2. a.

Otherwise, if the service due be not for the sole benefit of him to whom

whom due, but also for the public good; as, a thing for the defence of the realm, advancement of justice, charity, &c. 6 Co. 2. a. Vide post, (F).

But if the king purchases part of the lands subject to his debt, he shall have execution upon the residue. R. Sav. 69.

**(D) Dr, by suspension of part, the whole will be suspended.**

So, if a tenant makes a gift in tail, or a lease for life, or for years, of part of his land to his lord, the whole rent will be suspended; for rent-service cannot be suspended for part by the act of the party, and *in esse* for the other part. Co. L. 148. b.

So, if the lessor enters upon the lessee for life, or for years, and ousts him of part of the land, the whole rent will be suspended. Ibid.

So, if there be a lease of a warren in three vills, rendering rent, and the lessor grants the reversion of the warren in one vill, the whole rent will be suspended; for rent due by contract shall not be apportioned; but perhaps the lessor will have a remedy upon his contract. R. 9 Leo. 1. 1 And. 26.

**(E) When there shall be an apportionment.**

But a thing of common right shall be apportioned; as, if a man who has a rent-service purchases part of the land, the rent, if it be not an entire thing, shall be apportioned. Lit. s. 222.

And this was by the common law, and not by construction upon the statute *quia emptores terrarum*. Co. L. 148. a. Cont. Dy. 4. b.

The rent-service shall be apportioned, if the lessee for life or for years surrenders part of the land to the lessor. Co. L. 148. a.

So, if the lessor grants or devises part of the reversion to another. Co. L. 148. a. R. Cro. El. 771.

Or, enters into part for a forfeiture. Co. L. 148. a. Dy. 5. a.

Or, recovers part of the land in waste. Co. L. 148. a.

So, if part of the land out of which the rent issues is evicted. Semb. 2 Cro. 160.

So, if a man, who has common appendant, purchases parcel of the land, the common shall be apportioned. Vide Common, (L).

So, if A. seised of one acre in fee, of another in tail, leases for life or years, or makes a gift in tail, reserving rent, and dies, whereon the issue in tail enters, the rent shall be apportioned. Co. L. 148. b.

So, a thing against common right sometimes may be apportioned; as, if a rent-charge in fee be granted by devise or fine, a moiety to A. in fee, a moiety to B. in fee, and no attornment is necessary. R. 2 Lev. 240.

If rent be apportioned in an action for the rent, the defendant may shew the value of the land, and at what rate the apportionment shall be made. R. 1 Vent. 276. Semb. Cro. El. 771. 2 Cro. 160.

Or, upon *nil debet*, it may be apportioned by the jury. 1 Vent. 276.

So, rent may be apportioned in equity, when it shall not by law. Vide Chancery, (2 E. — 4 N 5.)

[If

[If A. appoint B. his collector, and direct B. to take and receive to his own use 100*l.* out of the first money he collects, this is an entire agreement, and B. cannot maintain an action on it for 75*l.* as for three quarters of a year's salary. 1 Salk. 65. 3 Mod. Rep. 153. S. C.]

[If a sailor, hired for a voyage, take a promissory-note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*. 6 T. R. 320.]

(F) *Dr.* a suspension only for part.

So, by act of law a thing may be suspended in part, and *in esse* for part; as, if the lord in chivalry, as guardian, enters upon the land of his tenant within age, whereby the rent is suspended during the minority; yet if the wife recovers dower, she shall pay a third part of the rent. Co. L. 148. b.

So, if the tenant makes a gift in tail to the father of the lord of part of his land, which descends to the lord, the seigniorship shall be suspended for part, and *in esse* for part. Co. L. 148. b.

So, if the terre-tenant makes a gift to the father of the grantee of a rent-charge of part of the land charged. Co. L. 148. b.

So, by the act of a stranger; as, if one joint-tenant or parcener disseises the tenant, the other may distrain for his moiety of the rent. Co. L. 148. b.

So, if one joint-tenant of a seigniorship purchases the tenancy, one moiety is extinct, and the other moiety shall be held of the other joint-tenant. Semb. 21.

(G) *When all the services, &c. remain, and are not apportioned or extinguished.*

So, if A. be seised of one acre in fee, and another in tail, and grant a rent out of both in fee, in tail, for life or years, and die, whereby the acre in tail is discharged, the whole rent remains upon the other acre; for he shall not take advantage of the imbecility of his estate to defeat his grant. Co. L. 148. b.

So, if a tenant holds by entire services, he shall not make an apportionment by his own act; but the services are multiplied; as, if tenant of three acres by homage, fealty, suit, &c. enfeoffs A. of one acre, A. shall do the same services entirely, and also the feoffer for the residue. R. 6 Co. 1. a. R. 8 Co. 105. b.

Or, by service of a hawk annually; for an entire annual service shall be multiplied, as well as casual. R. 6 Co. 1. a.

So, though the entire annual service be a matter of profit; as, an horse, ox, &c. as well as where it is a hawk, dog, or other matter of pleasure. R. 8 Co. 105. b.

So, if the tenant holds by a personal service to be done by the person of a man; as, the service of chivalry, to be sewer, butler, &c. if the tenant aliens parcel, the service shall be multiplied, where it can be done without prejudice to the lord; as, in service of chivalry, if it cannot  
not

not be multiplied without his prejudice; as, to be butler, &c. the service remains, but shall not be multiplied. R. 8 Co. 105. b.

So, in services for the public good; as, for defence of the realm, advancement of religion, justice, charity, &c. though they are entire, the act of the lord himself shall not make an extinguishment, but they remain; as, if the lord purchases part of the land held by chivalry, escuage, castle-guard, cornage, &c.; for the service is for defence of the realm. 6 Co. 2. a.

Or, by the service of making a bridge, beacon, repairing an highway, &c. 6 Co. 2. a.

Or, by the service of finding a preacher in such a church, marriage for a poor virgin, &c. annually. 6 Co. 2. b.

Or, by service to aid the sheriff, to be high constable, keep the king's records, &c. 6 Co. 2. a.

So, a thing collateral to the land shall not be extinct by unity of possession; as, if an abbot, &c. was seised in fee of lands out of which tythes are payable, and of the rectory to which: for when the union ceases, the tythes revive. Vide Dismes, (E 9.)

If A., having a warren in the land of B., purchases the land, the warren is not extinct; but when he aliens the land, it revives. Bro. Exting. 5.

So, shack common, or by reason of vicinage. R. 1 Rol. 935. l. 36.

So, the privilege of a manor within the purlieu of a chace, to hunt within the chase, is not lost, if the manor and chace come to the king, who afterwards aliens the manor. Dy. 327. a. 1 Rol. 935. l. 40.

So, if A., having a portion of tythes out of the rectory of B., purchases the rectory, the portion is not extinct. R. 2 Rol. 161.

So, a matter of necessity will not be extinct, by unity of possession; as, a way of necessity. 1 Rol. 936. l. 2. Vide Chimin, (D 4.)

So, if, by custom in London, the owner of a tenement has a gutter in a tenement adjoining, and afterwards purchases the tenement in which, and after that aliens again, the alienee cannot stop the gutter; for it was as necessary afterwards as before. Bro. Exting. 60. Per. Cur. 11 H. 7. 25. b.

If the close of A. ought to repair the fence of B. who purchases the close of A. in fee and dies, whereby the closes are divided between the daughters, the prescription continues. Dub. Dy. 295. b.

So, a thing which runs with the land will not be extinct by unity of possession; as, if the lord purchases land of the nature of gavel-kind or borough English, the custom remains. 11 H. 7. 25. b.

The custom of free-bench. Bro. Exting. 14.

So, if the lord purchases part of the land, where, by custom, an heriot is due upon the death of every tenant, the heriot shall not be extinct. Co. L. 149. b. 8 Co. 106. b.

So, where a lessor has land by contract from an under-lessee, no rent shall be suspended contrary to the agreement of the parties; as, if A. leases to B. for twenty-one years, rendering 20l. per annum, and B. leases to C. rendering no rent for ten years, and C. assigns his term to A., the rent of B. shall not be suspended or apportioned, but he shall pay 20l. per annum as before. R. 2 Lev. 143.

SWAN-

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**(A) Time ; how computed ; inclusive or exclusive.**

How the year, month, day, shall be computed, vide Ann.

When by the calendar or lunar month, vide Ann.

If a thing be limited to be done within such a time after such a fact, the day of the fact shall be taken inclusive ; as, where the st. 27 Eliz. 18. requires an action against the hundred within a year after the robbery, the day of the robbery shall be included within the year. Per two J. one cont. Hob. 139. 2 Rol. 520. l. 47. [Vide Doug. 465. Vide Hundred, (C 4.) Vide 3 T. R. 623. acc.]

[The word "from," or "after," may mean either in or exclusive. Cowp. 714. Lofft. 276., but *prima facie* is inclusive. Dougl. 463.]

[So, when the law requires that a month's notice of an action shall be given, the month begins with the day on which the notice is served. 3 T. R. 623.]

[So, where the st. 21 Jac. 1. 2. 19. s. 2., enacts that a trader lying in prison two months, lunar, after an arrest for debt, shall be adjudged a bankrupt, the day of the arrest is included, 3 East, 407.]

[A permit for the removing of wine from one place to another under the stat. 26 Geo. 3. c. 59. s. 30. & 35., dated nine o'clock in the morning one day, and giving the party one hour for removing it out of A.'s stock, and two days more for delivering it into B.'s stock, expires at ten in the morning of the second day after it is granted. 5 T. R. 255.]

But where it is limited within such a time after the date of a deed, &c. the day of the date shall be taken exclusive ; as, a protection shall be for a year, exclusive of the day of the date. Hob. 139.

By the st. 27 H 8. 16. it is sufficient if a deed be inrolled within six months, exclusive of the day of the date. Hob. 139. Vide Bargain and Sale, (B 8.)

[In temporal cases, time is computed by lunar months ; in ecclesiastical, by solar. 1 Bl. Rep. 450.]

[Therefore a month's time to plead, is a lunar month. Ibid. Doug. 463.]

When the commencement of a lease is exclusive of the date or not, vide Estates, (G 8.)

**(B) Of what times the law takes notice.**

**(B 1.) Of a year and a day.**

The law takes notice of the commencement and course of the year, and all times which depend upon the calendar. Vide post, (B 2.) Vide Ann.

So, of the commencement and end of the term. 1 Sid. 304.

And, therefore, if there be a promise upon forbearance till Easter term ; it is sufficient to say, that he forbore accordingly, without saying what day that was. R. 2 Cro. 548.

[Although

[Although the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. 3 Burr. 1434.]

[The day may be divided to answer the real ends of justice. Dyer, 345. Salk. 625. 3 Wils. 274. 3 Burr. 1241. 1434.]

[And there is no reason why the very hour may not be divided, where it is necessary, and can be done; for it is not like a mathematical point which cannot be divided. 3 Burr. 1434.]

### (B 2.) Of the calendar.

So, the judges may take notice of the calendar; as, if an inferior court be held 16th February, the court may take notice by the almanac that it was upon a Sunday, without trial by the country. R. Cro. El. 227. 1 Leo. 328.

So, of moveable feasts as well as immoveable, and the course of the moon, upon which they depend, the court will take notice by the almanac; for, without that, they do not know the one or the other. Mod. Ca. 160. 196.

So, the calculation of Easter. Mod. Ca. 196.

So, if a court be alleged *die Mercur. 3 die M.* where the 3 *dies M.* was *dies Lunæ*, it is error. R. 1 H. 7. 12. b.

Or, *die Jovis super festum S. Andree*, where that feast was *die Veneris*. 1 H. 7. 12. b.

But where a time is mentioned, 'not fixed by the calendar, it ought to be specially averred; for otherwise the court does not take notice of it; as, if a leet be alleged 18th April, though that be within a month after Easter, yet the court need not take notice of a moveable feast. Jon. 301.

If a breach of covenant be alleged 20th June, they need not take notice whether it be within Trinity term; for the end and commencement of Trinity and Easter terms not being fixed by the calendar, the court need not take notice of them. Semb. 1 Sid. 308. R. per three J. Cro. El. 210.

If a writ of inquiry be returnable *die Lunæ post. 15 Hilar.*, and executed 27th January, the court need not examine whether it be before or after the return. R. Cro. Car. 53.

So, though it has a relation to a time known by the calendar; as, if a man promise payment at Whitsuntide fair, in *assumpsit* after Whitsuntide, it must be averred that Whitsuntide fair is passed, otherwise it is error; for the court does not take notice of it. R. 1 Rol. 29. l. 45.

So, where the calendar shows the time, the court, after execution done, need not consult it to avoid the debt, though they will examine it before execution. 2 Jon. 228.

Yet they may take notice, if it be mentioned *ore tenus*, as well as if it was assigned upon the record. Mod. Ca. 196.

[By st. 24 Geo. 2. c. 23. the calendar is corrected, and new style established. The year 1752 to begin 1st January 1752, and the day after the 2d September 1752 to be accounted the 14th September.]

[The 25 G. 2. c. 30. provides that the time for opening, using, enclosing, and shutting up lands and grounds used for common of pasture or other purposes, for the paying of rents and other payments, and for the doing of other things, if such times are depending on any moveable feast

feast, shall be computed according to the new calendar. But this act shall not abridge, enlarge, confirm, or alter. the title of any person, or any body politic, to any such lands, except as to the new computation of time when the enjoyment of such right shall commence.]

(B 3.) *De die Dominico.*

[Dig. Sunday.]

The award of any judicial process upon a Sunday is void. Jon. 156.

So, the entry of any judgment upon record. Jon. 156.

So, if judgment be given upon a Sunday in an inferior court, it will be void. R. Cro. El. 227. 1 Leo. 328. 3 Burr. 1595. 1 Bl. 496. 526.

So, the return of a writ by a sheriff. R. Mod. Ca. 148. 159. 196.

[A writ of inquiry executed on a Sunday is naught, and advantage may be taken of it on writ of error, though not assigned for error. Fort. 373.]

[If the vouchee die on the return day of the writ of summons falling on a Sunday, the recovery will not be good. 1 Bl. Rep. 526.]

So, now by the st. 29 Car. 2. 7. if any on the Lord's day serve or execute process, warrant, order, judgment, or decree, (except for treason, felony, or breach of the peace,) it shall be void to all intents, as if done without process, warrant, &c.

And therefore false imprisonment lies for it. 1 Sal. 78. 5 Mod. 95.

[And it cannot be made good by any subsequent waiver of the defendant, by his not objecting till after a rule to plead given. 3 East, 155.]

[A service of notice of declaration is bad, though the defendant accept it, knowing it to be irregular. 1 H. Bl. 628. Vide 3 East, 155.]

And prohibition to the spiritual court, if the proceeding be upon process issuing from thence. Semb. 5 Mod. 449.

[And one who is convicted on a penal statute cannot be apprehended on a Sunday for the forfeiture. 1 T. R. 265.]

[Service of notices not allowable as to those on which rules are made; thus, notice of plea filed. 8 East, 547. Nor can service of notice of declaration be on the preceding Saturday, where the essoign falls on Sunday. 2 N. R. 75.]

But before the st. 29 Car. 2. 7. all ministerial acts upon a Sunday were lawful, though not judicial; as, an arrest by an officer upon process. R. 9 Co. 66. b. 2 Cro. 280. Godb. 280. 2 Bul. 72.

So, by the st. 29 Car. 2. 7. execution of process, warrant, &c. in cases of treason, felony, or breach of the peace, is allowed.

And execution of a warrant of justices of peace for good behaviour is lawful within this exception. R. Ray. 250. Before the statute it was held cont. Cro. Car. 602.

So, an information may be exhibited on a Sunday upon a special law. R. Jon. 156.

So, if a defendant arrested on a Saturday escapes, he may be re-taken upon the Sunday; for that is not an execution of process, but a continuance of the former imprisonment. Mod. Ca. 231.

[A. was arrested at the suit of B., and discharged, the sheriff not knowing that there was a detainer in his office at the suit of C.; on the

Sunday following he was arrested at C.'s suit, and discharged by the court by virtue of the stat. 29 Car. 2. c. 7. s. 8. it being considered as an original taking. 5 T. R. 25.]

So, bail may seize their principal on a Sunday. Mod. Car. 231.

[But sheriff's bail cannot take the defendant on a Sunday, in order to surrender him. 2 Bl. Rep. 1273.]

So, a person may be taken upon an escape-warrant on that day; for it is in the nature of a taking upon fresh suit. R. 6 Mod. 95. 2 Ld. Raym. 1028. 2 Salk. 626. 3 Salk. 148. S. C.

[A person may be arrested on a Sunday on an attachment for a rescue. Willes, 459.]

[A person may be arrested on Sunday, on Lord Chancellor's warrant, on an order of commitment for contempt; for he is considered as in custody from the time of making the order, and the warrant is directed to the gaoler, and is in the nature of an escape-warrant. Semb. 1 Atkyns, 55. 1 T. R. 265.]

[A person may surrender voluntarily on a Sunday. Ibid.]

[Process on an indictment, an attachment for a contempt may be served on a Sunday. Ibid.]

[A man may be taken on attachment, for non-performance of an award, on a Sunday. Ibid. 1 T. R. 266. contra.]

[A rule *nisi* for an attachment for non-payment of money pursuant to the master's *allocatur*, cannot be served on a Sunday. 8 T. R. 86.]

So, a proclamation upon summons may be made on a Sunday, according to the statute 31 El. 3. Semb. per Holt, 5 Mod. 449.

So, a citation out of the spiritual court may be published at the door of the church on a Sunday, according to the usage of the court, though it cannot be served upon the person. Semb. per Holt. 5 Mod. 450. Garth. 504.

So, hue and cry may be made upon a Sunday. R. Godb. 280.

And if the hundred refuse to make it, they shall be punished for the neglect. Per three J. Mont. cont. Godb. 280.

[So, parliament may sit on a Sunday, as it did Oct. 26th, 1760, on the demise of the king. 1 Bl. Rep. 499.]

By the st. 1 Car. c. 1. continued by the st. 3 Car. 4. and 16 Car. 4. if any assemble on the Lord's day out of his parish for sports, or in his parish use bear or bull-baiting, interludes, or unlawful pastimes, if convicted by any justice of peace, on view, by confession, or one witness, in a month, he shall forfeit 3s. 4d. for every offence, to be levied by distress and sale, &c.; and for want of distress, be set in the stocks three hours.

[Penalty for opening certain houses of amusement on a Sunday. 21 G. 3. c. 49.]

By the st. 1 Jac. 22. shoemaker, &c. who shows for sale any shoes, boots, &c. on Sunday, shall forfeit 3s. 4d. for every pair, and the value to be recovered by action, &c.

By the st. 3 Car. c. 1. continued by the st. 16 Car. 4. if a butcher, or any for him, by his privity, kill or sell any victuals on the Lord's day, and be convicted in six months, on view of a justice of peace, by confession, or two witnesses before any justice of peace, he shall forfeit 6s. 8d. for every offence, to be levied by distress and sale, &c. or by information,  
bill,

bill, &c. in a court of record of a corporation, or in sessions, to the use of the poor.

[Selling meat on Sunday no offence at common law; therefore indictment must be *contra formam*, &c. Str. 702.]

By the st. 3 Car. c. 1. a carrier, waggoner, carman, or drover, or any for him, travelling with horse, waggon, cart, or cattle, on the Lord's day, shall forfeit 20s., to be levied *ut supra*.

So, by the st. 29 Car. 2. 7. a horse-courser.

[Baking dinners for customers is not an exercise of one's calling. 5 T. R. 449.]

[One penalty only in the compass of a day is incurred by exercising one's calling. Cowp. 640.]

[Contracts on a Sunday are valid, unless made in the exercise of one's calling. 1 Taunt. 131.]

### (C) *Dies juridici.*

#### (C 1.) What are the terms : — Hilary term.

*Dies juridici* are within the four terms only. Co. L. 135. a.

The terms were settled before the Conquest in the time of the Saxons. Per Dod. 2 Rol. 443.

And comprehended all times of the year, except Christmas, Lent, Whitsuntide, and harvest. 2 Rol. 443.

Hilary term antiently began, as it seems, *oct. Epiphan.*, which was the feast of St. Hilary, viz. 13th January, and continued till *Septuagesima*, which was the third Sunday before Lent. Dugd. Or. J. 90.

But afterwards the beginning was enlarged till *oct. Hil.* and the continuance till Lent. 2 Rol. 443.

And it was afterwards ascertained and confined to the four returns *oct. Hil. quinden. Hil. cras. Pur.* and *oct. Pur.* which was the 9th Feb. and the *quarto die post* was the 12th Feb., which is now the last day of the term. Vide st. 51 H. 3. *Dies Communes in B. et in Dote*.

#### (C 2.) Easter term.

Easter term antiently began *oct. Paschæ*, and ended the day before the vigil of the Ascension, as it seems. Dugd. Or. J. 91.

But afterwards the beginning was deferred till *quinden. Paschæ*, and the end till the Monday before Whitsuntide, so that five returns were contained in it. *Quind. pas. tres sept. Mens.* and *5 sept. Paschæ*, and *cras. Ascent.* 2 Rol. 443. Vide the st. 51 H. 3. *Dies Communes*.

#### (C 3.) Trinity term.

Trinity term antiently began *cras. Trin.*, or *oct. Pentecost*, and continued till the *gule* of August, containing six returns. *Cras. oct. quind. Trin. cras. oct. quind. Joh. Bapt.* 2 Rol. 443. St. 51 H. 3. *Dies Communes*.

But, by the st. 32 H. 8. 21., Trinity term shall have but four returns only, *cras. oct. quind. Trin. et tres sept. Trin.* and shall commence for ever on the Monday after Trinity for essoigns, returns, proferts, &c. And full term shall begin on Friday next after *Corpus Christi*, as before it began on the Wednesday.

And if the feast of St. John the Baptist happens upon the Friday,  
D d 2 yet

yet the term now begins upon the same day, and it shall be *dies juridicus*. R. 2 Cro. 16. 1 Rol. 29.

(C 4.) Michaelmas term.

So, Michaelmas term began antiently *oct. Mich.*, and continued till Advent. 2 Rol. 443. Dug. Or. J. 91.

And contained eight returns *oct. quind. tres sept. mens. Mich. cras. Animar. cras. oct.*, and *quind. Martini*. St. 51 H. 3. Dies Communes.

But, by the st. 16 Car. 1. 6., Michaelmas term shall be restrained to the six last returns only, and shall commence on the *quarto die post tres sept. Mich.*, unless it be Sunday, and then on the morrow.

[By stat. 24 G. 2. c. 48. it contains only four returns, *cras. Om. Anim. cras. Mart. oct. S. Mart.* and *quind. S. Mart.* and begins on the fourth day of the morrow of All-Souls, (6 November).]

[In the eye of the law the essoign day is for many purposes the first day of the term; the *quarto die post* is only an indulgence. 3 T. R. 185.]

How the term may be adjourned by writ of adjournment, and the effect of it. Vide Adjournment, (A 1, &c.)

(C 5.) *Dies non juridici*.

But by the law of the church and the laws of Edward the elder, Knute, Edward the Confessor, and H. 1. *judicia et juramenta* were prohibited (whereby all proceedings in law are comprehended) *ab Adventu Domini usque oct. Epiph.*, a *septuagesimā ad oct.* or *quind. Paschæ*, *ab Ascensione Domini ad oct. Pentecost*. Dugd. Or. J. 89. Wilk. L. Angl. Sax. 197.

And by the laws of Edward the Confessor, the prohibition was extended *diebus 4 temporum, omnibus Sabbathis ab horā tertiā post meridiem tota die sequente usque diem Lunæ, vigiliis S. Mar., S. Mich., S. Joh. Bapt., Apostolor. omnium et Sanctor.* Dugd. Or. J. 90. Wilk. L. Angl. Sax. 197.

And by the canon law, from Advent to the *Utas Epiphan.*, a *Septuagesimā ad Utas Paschæ*, in the days of the four times of the great *letanies*, of the *rogations*, the week of Pentecost, the time of cutting corn or vintage, which lasts from St. Margaret (which was 13th July) till *quind. Mich.* 2 Inst. 264.

And therefore now *Dies Dominicus*, though it be in term, is not *dies juridicus*. Co. L. 135. a.

Nor, in Hilary term, the day of the purification of the blessed Virgin Mary, in Easter term, the feast of the Ascension, in Trinity term, the feast of St. John the Baptist, except when it falls on the first day of the term, in Michaelmas term, All Saints and All Souls. [Since the st. 24 G. 2. 48. these days are not within Michaelmas term.] Co. L. 135. a. 2 Cro. 16. 2 Inst. 265.

[On 29th May, restoration-day, only one judge comes down, and business is not usually done; but it may, and it being the last common paper-day in P. 7 G. 3. the one judge went through the paper, or the parties could not have had their judgment that term. 4 B. M. 2089.]

[The 29th May is not a holiday in any of the law-offices, and consequently no officer can take an extraordinary fee for business done on that day. 7 T. R. 336.]

[St.

[St. Barnabas' day no holiday at the seal-office. 2 Bl. Rep. 1314.]  
[The only allowed holidays are Candlemas, the Ascension, and St. John the Baptist. Ibid. Vide 1186.]

But the chancery is always open.

So, the exchequer may sit upon a Sunday, or out of term. *Mad.* 551.

(C 6.) What things are lawful upon them.

Yet by the st. W. 1. 51. it is enacted, that assizes of novel disseisin, *mort d'ancestor*, and darrein presentment, shall be taken in Advent, *Sep-tuagesima*, or Lent, as other inquest.

So, where by custom the court of a lord is to be held every Monday, if it falls upon Christmas, or new year's day, which are not *juridici*, yet the court may then adjourn.

So, if the county court happens upon such a feast, they may elect knights for parliament.

But an award of judicial process, or entry of a judgment upon such a day, is void. *Jon.* 156. Vide ante, (B 3.)

[Bail above may be put in. 5 T. R. 170.]

(C 7.) The term is only one day : — In what respects.

The term, regularly, is esteemed as one day ; and therefore if a deed be alleged to be inrolled in such a term, it shall be intended the first day. R. 4 Co. 71. a.

If judgment be given in full term, it relates to the first day of the term. R. 1 Bul. 35.

And the first day is the *essoine*-day, for the *quarto die post* is a day of grace. R. 1 Bul. 35.

And therefore, inspection of an infant may be upon the *essoine*-day, and judgment upon it. R. 1 Bul. 35.

So, a judgment relates to the first day, though a day be assigned for argument at a day subsequent. R. 1 Bul. 69.

[Sittings after term are reckoned as one day only. 4 T. R. 590.]

(C 8.) In what not.

But where the day is material, it may be alleged that the thing was done such a day in the term. 4 Co. 71.

As, if there be an award 20th May, that all proceedings in an action shall cease ; it may be alleged, that the party afterwards proceeded and had judgment, though the judgment relates to the first day of the term, which was before the award made. Per Poph. *Yel.* 35.

So, the *quarto die post* is the full term, and the day for appearance of the parties. 1 Bul. 35.

And there shall be no judgment against a defendant upon his default till the *quarto die post*. R. 1 Bul. 35.

So, proclamations upon a fine must be in full term ; for the pleas are to cease. 1 Bul. 34.

[If money is paid between the first day of term, and the day on which a *latitat* is sued out, plaintiff shall enter a special memorandum, and it shall be as of the day of the return of the writ. B. R. H. 141.]

[Plaintiff may show the true commencement of an action, contrary to the fiction of law, even in penal actions. 3 B. M. 1241.]

[If there is no special memorandum, he may show by the writ that the action was commenced after the time to which the bill relates. 3 B. M. 1241.]

[The defendant's dying before the actual day of trial at the sittings in term, abates the suit. 3 B. & P. 549.]

[Where a party dies after the commission day, and before the trial, the verdict is good. 7 T. R. 31.]

### (D) Reasonable time.

What shall be reasonable time, the justices are to determine.

["Reasonable time" is, in its nature, a definite period. 2 M & S. 50.]

[And is implied by a statute where no time is specified for performance of an act enjoined. 2 M. & S. 43.]

### (E) When night is unseasonable.

Summons in a real action ought not to be after the setting of the sun. R. Cro. El. 42.

Nor, a demand of rent.

### (F) When not.

But an arbitrament made in the night is good. R. Cro. El. 42.

So, livery of seisin upon a feoffment. Cro. El. 43.

### (G) Time of limitation.

#### [(G 1. a.) General rules.]

[The statute of limitation always receives a strict construction; therefore, presumptions are against adverse possession as between privies. 2 B. & P. 542.]

[The rule that a statute limitation continues to run after it has once commenced, notwithstanding a subsequent disability, applies, without exception, to all the statutes of limitations, therefore to the statute 4 Hen. 7. c. 24. 4 T. R. 300.]

[Where an ancestor died seised, leaving a son and daughter infants, and the son still an infant, went abroad, and there, as was found by the jury, died under age; held, that the daughter, under the statute of limitation, had only ten years after coming of age, or twenty years after the death of the ancestor, to bring an ejectment. 2 Smith, 236. 6 East, 80.]

[The rights of those persons who are under disabilities, and of their heirs, are saved as long as the disabilities continue, and five years after, but no longer. 2 H. Bl. 584.]

[The disability of one parcener at the time of descent, will not prevent the statute of limitation operating on the interest of her co-parcener. 2 Taunt. 441.]

[If a lease contain a proviso for re-entry for condition broken, and the lessee commit a forfeiture, and afterwards continue in possession under the lease for more than twenty years, without subsequently doing any act to acknowledge a tenancy, the entry of the lessor will not be barred

barred at the expiration of the lease, because he is not bound to take advantage of the forfeiture.]

(G 1. b.) In actions real: — When reduced to sixty years.

[The statutes of limitations are a very beneficial system of laws, and of the greatest importance, inasmuch as they are statutes of repose. 4 T. R. 308.]

The time to make title to an inheritance is *de tempore cujus contrar. memorium hominum non existit*, of which, vide in Præscription, (A — E 1.) or a time limited for such particular actions. Co. L. 115. a.

Before the st. of Merton, in a writ of right, it was a *tempore regis Henrici senioris*, viz. the beginning of the reign of H. 1. which began 1 August 1100. 2 Inst. 94.

By the st. of Mert. 20 H. 3. 8. a writ of right is limited a *tempore regis H. avi nostri*, viz. the coronation of H. 2. which was 20 October 1154. 2 Inst. 94.

By the st. W. 1. 3 Ed. 139. in a writ of right none shall count of the seisin of his ancestor of a longer seisin than of the time of king Richard, uncle of king Henry, father of the king that now is, viz. the reign of R. 1. which began 7 July 1189. 2 Inst. 238.

The limitation a *tempore* R. 1. imports the first day of his reign. Co. L. 115. a. [2 Inst. 94. 238. 3 T. R. 41.]

And now, by the st. 32 H. 8. 2. no person shall maintain any writ of right, or make any prescription, title, or claim to any manors, lands, tenements, rents, annuities, commons, &c. or other hereditaments of the possession or seisin of any, his ancestor or predecessor, or allege any further seisin or possession of such ancestor or predecessor, than within sixty years before the *teste* of the same writ, or before the said prescription or title made.

And if any sue such action, and cannot prove his ancestor or predecessor in seisin, or actual possession within the years before limited, if the same be traversed or denied, &c. he and his heirs shall be barred for ever.

And therefore in all actions, which are of the nature of a writ of right, in which the plaintiff or demandant must count of a seisin, and recover any hereditament, he shall be barred, if his ancestor had not seisin within sixty years. (Vide Bro. upon the St. Lim. 16, &c.)

As, in a *nativo habendo*; for it is a writ of right in its nature, in which the villein shall be recovered. Bro. upon St. Lim. 17.

In a writ of customs and services, for the seigniorship shall be recovered. Bro. upon the St. Lim. 16.

A *quod permittat* for estovers. Bro. St. Lim. 23, 24.

So, if there be a plaint in a court-baron, &c. and the plaintiff makes protestation to sue in the nature of a writ of right, he shall be barred, if there was not a seisin within sixty years. Bro. St. Lim. 21.

So, if there be an action in a court of *antient demesne* upon a writ of right close. Bro. St. Lim. 22.

So, if a bishop or other sole corporation sue upon a seisin of his predecessor, he shall be barred, if the seisin was not within sixty years. Bro. St. Lim. 33.

So, if a man claims a thing by prescription, he must allege seisin of the

the same thing, where a seisin is necessary, within the time of limitation. Bro. St. Lim. 34, 35.

So, where *esplees* or seisin ought to be alleged, the count ought to allege them within time of limitation. Bro. St. Lim. 19.

And therefore, if they are alleged in the time of the king then dead, and part of his reign extend beyond the time of limitation, it ought to allege seisin such a year of such a king. Bro. St. Lim. 13, 14.

And seisin in law is sufficient without actual seisin. R. 4 Co. 10.

#### (G 2.) When to fifty years.

By the st. Mert. 20 H. 3. 8. *brevia mortis antecessoris, de nativis, et de ingressu non excedant ultimum reditum domini regis Johannis de Hibernia in Angliam*, viz. the twelfth year of K. John. 2 Inst. 94.

And by the same stat. *brevia novæ disseisinæ non excedant primam transfretationem domini regis nunc in Gasconiam*, viz. 5 H. 3. 2 Inst. 95.

By the st. W. 1. 39. writs of *mort d'ancestor, cosinage, aiel*, entry and *nativis*, have term from the coronation of the same king Henry, and not before, viz. 28 Oct. 1 H. 3. 2 Inst. 95. 238. Writs of *novel disseisin* and *nuper obiit* have from the first passage of king Henry, viz. 5 H. 3. 2 Inst. 95. 238.

But now, by the st. 32 H. 8. 2. no person shall maintain assise of *mort d'ancestor, cosinage, aiel*, writ of entry *sur disseisin*, or other possessory action of the possession of any of his ancestors or predecessors, for any manors, lands, &c. of any further seisin, but within fifty years next before the *teste* of the original.

And by the same stat. *scire facias* on fines shall be sued in fifty years after cause of action fallen, and not after.

#### (G 3.) When to forty years.

So, by the st. 32 H. 8. 2. no person shall make any avowry or cognizance for any rent, suit, or service, or allege any seisin or possession thereof in any ancestor, himself, or any other, above forty years next before such avowry or cognizance.

And therefore, in an avowry and cognizance for rent service, or seek, seisin must be alleged within forty years. (Vide Bro. St. Lim. 63, &c.)

And if seisin be alleged within time, the defendant may plead, that he was never seised within forty years.

And it will be a good plea, though the tenant make a feoffment at this day to hold by the same services whereby he himself holds; for it is not a rent created *de novo* in certain, but refers to the antient rent. Cro. Car. 215.

So, if a rent-service be saved by an act of parliament, the st. of limitations will be a good plea; for it is not a rent created by the statute. Cont. per three J. but two J. acc. and it was R. in B. R. upon error. Cro. Car. 81. 214. Jon. 233.

But in an avowry for rent, the avowant need not allege seisin within the time limited by the statute, where seisin need not have been alleged before; for it shall come by plea from the other party, if he was not seised. Mo. 91.

#### (G 4.) When to thirty years.

So, by the st. 32 H. 8. 2. no person shall maintain any action upon his

his own seisin or possession above thirty years before the *teste* of the original.

And therefore shall not maintain admeasurement of dower of his own endowment; for he recovers the land. Bro. St. Lim. 15.

(G 5.) When to twenty years.

So, by the st. 32 H. 8. 2. all *formedons* in reverter, or remainder, shall be sued in fifty years after title or cause of action fallen, and not after.

And by the st. 21 Jac. 16. all *formedons* in discender, remainder, or reverter, shall be sued in twenty years after title or cause of action first fallen, and at no time after.

And therefore, a *formedon* in discender must be sued within twenty years after the cause of action fallen.

Though it was not within the st. 32 H. 8. 2. 4 Co. 11. a. Dy. 278. a.

So, by the st. 21 Jac. 16. no person shall make entry into any lands, &c. but in twenty years next after his title of entry, which shall first accrue to the same; and in default thereof such person so not entering, and his heirs, shall be disabled utterly from such entry.

And therefore, though since the st. 32 H. 8. 2. a man might have entered after sixty years, if his entry was *congeable*, and afterwards have maintained any possessory action. R. 4 Co. 12. a.

Yet he is at this day debarred of his entry, if it be not made within twenty years.

[In ejectment for mines, plaintiff proving himself lord of the manor, and in possession of it, does not avoid the statute of limitations, if defendant has been in possession of the mines twenty years; for they are distinct possessions, and may be different inheritances. Str. 1142.]

And by the st. 4 Ann. 16. no entry or claim shall be sufficient, unless an action be prosecuted within a year after.

And the entry or claim must be made upon the land, unless it be prevented by a special cause. R. 1 Sal. 285. Mod. Ca. 44.

So, a joint-tenant is not barred by non-entry in twenty years, if his companion was in possession. R. Mod. Ca. 44.

Nor, one parcener, who has the whole by devise, where the other parcener takes the profits. H. 1 Ann. inter Reading and Roiston, Sal. 423.

So, by the st. 10 & 11 W. 3. 14. no fine, common recovery, or judgment in action, real or personal, shall be reversed for any error or defect, unless error be commenced and prosecuted with effect within twenty years after such fine levied, recovery suffered, or judgment signed or entered on record.

[A reversioner cannot have error after twenty years, though his title did not accrue till after the expiration of them, and though error is brought in less than twenty years after the commencement of his title. Str. 1257.]

[Copyholds are within the statute of limitations. Moor, 410. 3 T. R. 162.]

[To make length of possession a bar under these statutes, it must be a possession adverse to the title of the true owner, and not length of possession during a particular estate. Cowp. 218.]

(G 6.) In

## (G 6.) In actions personal: — When to six years.

So, by the st. 21 Jac. 16. all actions of trespass, detinue, trover, and replevin for goods and chattels, account, and upon the case, (other than such accounts as concern trade of merchandise between merchant and merchant, their factors and servants,) all actions of debt without specialty, or for rent, (other than trespass for assault, menace, battery, wounding, or imprisonment, and actions on the case for slander,) shall be brought in six years next after the cause of such actions, and not after. Vide Action upon the Case upon Assumpsit, (D — H 6, 7.)

And therefore an action upon the case for *trover* must be brought within six years. R. 3 Cro. 246. 333.

So, debt for damage *clere*; for it is not founded upon a record. R. Ray. 243.

So, account, after an account stated between merchants. Semb. Jon. 401.

[The exception as to merchants' accounts, is only meant to prevent dividing a running account, but extends not to accounts closed and concluded. 2 Vesey, 400.]

So, an account by an inland merchant against his factor; for the exception in the statute does not extend to inland merchants. R. Ca. Ch. 152.

So, *assumpsit* or any action, except account, though it be for a merchant's account. R. 2 Mod. 312. 1 Mod. 70.

So, *insimul computasset*, or *indebitatus assumpsit*, upon an account stated. R. per three J. 1 Lev. 287. 298. 2 Sand. 127. R. 4 Mod. 105. 2 Mod. 311.

So, *assumpsit* by an attorney for fees. R. 3 Lev. 367. D. cont. 2 Mod. 213. R. acc. Carth. 144.

So, action upon the case for an escape, but not debt. 1 Sid. 306.

[An action of crim. con. is an action upon the case, and the limitation to it is six years. 2 Smith, 486. 6 East, 387.]

So, *assumpsit* upon a bill of exchange, though it be between merchants; for it is tantamount to an account stated. R. 4 Mod. 105. Sho. 341.

So, the statute of limitations will be a bar, though part of the time elapsed during the rebellion, when there was an interruption of justice. R. 1 Lev. 31. 111. Sal. 420.

Though the defendant had privilege of parliament. R. 1 Lev. 111. Sho. 99.

Or, was out of the kingdom. R. Sal. 420. R. Sho. 99. 2 Ver. 541. Hard. 502. But vide post, (G 16.)

Though the plaintiff had obtained judgment or sentence for it in France, or another kingdom; for here it is to be considered only as a debt upon simple contract. R. 2 Ver. 540.

So, by the st. 3 & 4 Ann. 9. actions on promissory-notes shall be brought within the time appointed for actions upon the case by the st. 21 Jac. 16.

So, by the st. 4 Ann. 16. all suits in the admiralty for seamen's wages shall be commenced in six years after the cause of action.

So, they ought to have been before. Semb. Mod. Ca. 26. Sal. 424. Hard. 502.

But

But the cause of action arises by the service, not by the contract. Mod. Ca. 26.

So, where the cause of action commences by a request, or upon any other condition precedent, the statute cannot be pleaded, if the action be commenced within six years after the request, &c. though it be ten years after the promise or contract. R. Godb. 497. Jon. 194. 329.

So, if an account be delivered between merchants, and one of them acknowledges so much due, the other insists upon more, it is not an account stated. R. Jon. 401.

So, the statute of limitations does not extend to suits in the admiralty or spiritual court.

[It is not sufficient that the writ bears *teste* before the expiration of the six years, it must be really and in fact taken out, for that is the commencement of the suit. And the true time may be averred and shown notwithstanding the *teste*. 2 B. M. 950.]

[Acknowledgment of the debt, after action brought, takes it out of the statute. 2 B. M. 1099.]

[The statute doth not begin to run against a foreigner till he comes into England. 3 Wils. 145. Vide supra, Action upon the Case upon Assumpsit, (H 6:)]

#### (G 7.) When to four years.

So, by the st. 21 Jac. 16. all actions of trespass for assault, battery, wounding, or imprisonment, shall be brought within four years next after the cause of action.

If trespass or imprisonment be alleged, 32 Car. 2. *usque* 1 Jac. 2. the defendant may plead, as to all the trespass or imprisonment, till 34 Car. 2. the statute of limitations, and another plea to the residue of the time. R. Sal. 420.

#### (G 8.) When to two years, and other matters.

So, by the st. 21 Jac. 16. actions upon the case for words shall be within two years next after the words spoken.

And if the words are actionable without a special damage, the statute of limitations will be a bar. R. Ray. 61. 1 Sid. 95.

So, an action *quia crimen felon. imposuit*. Ray. 61. 1 Sid. 95. if it be not within six years. Vide infra.

But an action for slander of a title is not within the st. 21. Jac. R. Cro. Car. 141.

Nor, an action for words founded upon an indictment, or other record. 1 Sid. 95.

Nor, an action *quia crimen felon. imposuit*. 1 Sid. 95. Vide supra.

[An action cannot be maintained against officers of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure; though a suit be instituted in the court of exchequer for the condemnation of the goods, which is depending at the expiration of the three months. 2 H. Bl. 14. 2 East, 254. S. P.]

[Where an action must be brought within three months, it is sufficient for the plaintiff to prove a writ sued out within such time, and his declaration within a year afterwards, without showing such writ returned. 7 T. R. 6.]

[The

[The limitation under the general highway act, of an action for a consequential injury, runs from the time the injury is sustained, not from the act which occasioned it. 16 East, 215.]

[Proceedings against the hundred on the statutes of hue and cry, must be commenced within a year after the robbery committed, and the day on which it was committed is to be included in computing the year. Dougl. 465.]

[The clause of limitation of actions against the hundred by the hue and cry act, 27 Eliz. c. 13. for the purpose of indemnifying the party robbed, held not to have been adopted by the riot act, 1 Geo. 1. c. 5, and the subsequent statutes, as a necessary consequence of their reference to the 27 Eliz.; and that the words "in such manner," &c. are confined to the mode of reimbursing the person damnified on the recovery of damages. 1 Price, 343.]

[If a statute enacts that an action for false imprisonment, in a practical case, shall be brought within six months after the act committed, and one half of a continued imprisonment happened within the other before six months anterior to the action, the plaintiff is entitled to recover for the half within that period. Every continuance of an imprisonment is a fresh one. 4 M. & S. 409.]

[The limitation of the action to one month in st. 26 Geo. 2. c. 21. for prohibited goods, must be after condemnation, provided due diligence be used in informing. 1 Blk. 392. 3 Burr. 1357.]

[If a statute for allotting waste lands within a manor, direct all disputed claims to be tried by a feigned issue, and limit the time for bringing such action to six months; an action brought against a copyholder within time, if abated by his death, must be revived against the heir within six months after the plaintiff has notice of the descent, though the heir be not admitted till long after that time." Cowp. 738.]

[A provision in an act of parliament limiting actions, "for any thing done in pursuance of this act, or in the execution of the powers and authorities herein granted," to a certain period after the cause shall have accrued, extends to cases where the party does an act within the limits of his official authority, but exercises that authority improperly, or abuses the discretion placed in him, believing all the while that he is acting within it. 3 M. & S. 580.]

[By a turnpike act, trustees are appointed, with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. By the same act, all actions for any thing done in pursuance of the act, shall be brought within six months after the doing of the thing complained of. A drain is cut in land adjoining the plaintiff's by which the latter is overflowed. *Semle*, the limitation of the action is to be reckoned, not from the time of doing the act, but of sustaining the injury. 1 Mars. 429. 6 Taunt. 29.]

[(G 9. a.) Informations in nature of *quo warranto*.]

[Vide 32 G. 3. c. 58.]

(G 9. b.) What cases are not within the statutes of limitations :  
— Such as may not fall within the time limited.

But the st. 32 H. 8. 2. does not extend to cases where the seisin is casual,

casual, and by possibility does not fall within sixty years; as it does not extend to the services of homage or fealty. R. 4 Co. 10. b. Co. L. 115. a. 2 Inst. 96. R. 3 Lev. 21.

Nor, to the service of covering the hall of the lord, or going with him to war. 4 Co. 10. b.

Nor, to a writ of right of dower; for the plaintiff does not count of her possession, nor of the seisin of any ancestor, and therefore it is out of the statute. Bro. St. Lim. 23.

So, for the same reason, it was enacted by the st. 1 Mar. 5. that 32 H. 8. shall not extend to a writ of right of advowson, *quare impedit*, *darrein presentment*, *jure patronatus*, writ of right of ward, ravishment of ward of body or lands holden by knight's service.

But seisin of homage must be alleged within the st. de Mert. 8. or W. 1. 39. 2 Inst. 96.

And seisin in law is sufficient since the st. 32 H. 8. 2. R. 4 Co. 10. 2 Inst. 96. Vide Seisin, (E).

#### (G 10.) In which seisin is not traversable

So, the st. 32 H. 8. does not extend to actions, in which seisin need not be alleged; as, wast; for the land is not directly in demand, and the plaintiff does not declare of any seisin in it. Bro. St. Lim. 20, 21.

Annuity; for the plaintiff does not declare upon a seisin, but upon his grant. Bro. St. Lim. 26.

Nor, where seisin, though it be alleged, is not traversable; as, in escheat, for the seisin is not traversable, but the tenure. 4 Co. 11. a.

In a *cessavit*, or writ of *rescous*. 4 Co. 11. a. Mo. 44.

#### (G 11.) Actions for discharge, &c.

So, the st. 32 H. 8. 2. does not extend to actions which go in discharge only, and not to recover any thing; as, in a *contra formam feoffamenti*; for the plaintiff only discharges himself. Bro. St. Lim. 15.

A *monstraverunt* by tenants in antient demesne. Bro. upon St. Lim. 17.

A *ne injuste vexes* upon an encroachment of services by the lord. Bro. upon St. Lim. 18.

A writ of mesne upon a deed of acquittal. Bro. St. Lim. 18.

A *quo jure*. Bro. St. Lim. 19.

A *warrantia chartæ*. Ibid.

Nor, to error upon a judgment, &c. till the st. 10 & 11 W. 3. Bro. upon St. Lim. 16. Vide ante, (G 5.)

Nor, to a writ of false judgment. Bro. upon St. Lim. 16.

Nor, to actions for contribution; as, a *contributione facienda*; for he recovers only damages for part of the charge of a suit. Bro. upon St. Lim. 15.

Nor, to an assise of nuisance; for nothing shall be recovered, but the nuisance removed. Bro. upon St. Lim. 20.

Nor, to a *quid juris clamat*, or *per quæ servitia*; for nothing shall be demanded but attornment. Bro. St. Lim. 20.

A writ of right of disclaimer. Bro. St. Lim. 23.

Nor, to a *scire facias* to execute a judgment; for the 32 H. 8. mentions only *scire facias* upon a fine.

Nor, to an attain.

So,

So, the st. 32 H. 8. 2. does not extend to proceedings without any writ; as, to a plaint in the courts of Wales, Cinque Ports, or other court. Bro. St. Lim. 21. Vide ante, (G 1.)

So, it does not extend to a corporation aggregate; as, mayor and commonalty; for they do not count upon a seisin of any ancestor or predecessor, but upon their own possession. Bro. St. Lim. 33.

On a dean and chapter. Ibid.

Otherwise a corporation sole. Vide ante, (G 1.)

So, it does not extend to the king; for he is not bound by the statute. Bro. St. Lim. 67. Dub. Stamf. Præ. R. 42. b.

Nor, to an avowry or cognizance; as, bailiff to the king. Bro. St. Lim. 67.

So, if a man can make title to possession within the time of limitation, he may maintain it by a title before the time of limitation; as, in an assise, if the plaintiff makes title at large by escheat forty years past, upon which he entered and was seised, till a disseisin by the defendant within thirty years. Bro. St. Lim. 26.

#### (G 12.) Prescription in discharge.

So, if a man claims by prescription a thing which goes in discharge only, it is sufficient to allege the usage *de tempore* R. 1. without alleging within sixty years; as, if he prescribes to oust from his common cattle that were not *levant* and *couchant*. Bro. St. Lim. 136.

To be discharged of toll. Bro. St. Lim. 39.

To drive cattle to a pound through the soil of another, without making amends for the escape. Bro. St. Lim. 41.

So, if he claims only an easement; as, liberty to enter his land to repair a gutter. Bro. St. Lim. 37.

To stop an aqueduct during the repair of a mill. Bro. St. Lim. 41, 42.

To have a way in the soil of another to church. Bro. St. Lim. 42.

#### (G 13.) Or, by *que* estate.

So, if a man prescribes by a *que* estate, and not in him and his ancestors, it is sufficient to allege *de tempore* R. 1. without saying within sixty years; as if he prescribes by a *que* estate to suit to his mill. Bro. St. Lim. 40.

So, if a corporation prescribes to be a corporation *de tempore* R. 1. it is well. Bro. St. Lim. 43.

So, if a woman prescribes to have dower, though her husband was attainted of felony. Bro. St. Lim. 45.

#### (G 14.) Avowry, &c. not for rent or suit.

So, an avowry need not allege seisin within forty years, unless it be for rent, suit, or service; and therefore, if a man avows for toll due fifty years past, it is well. Bro. St. Lim. 64.

Or, for an amerciamient in a leet. Bro. St. Lim. 67.

Or, for a *nomine pænæ*. Ibid.

Aid to make his son a knight, or to marry his daughter. Bro. St. Lim. 72, 73.

Or, for relief. 2 Inst. 95.

So, for the fees of a knight or burgess of parliament. Bro. St. Lim. 73.

But

But in an avowry or cognizance for relief, &c. where the seisin is traverseable, the party must allege seisin within the time limited by the *st. de Mert.* 8. viz. *post Transfretationem*, H. 3. in *Gasconiam*. 2 Inst. 96.

So, it does not extend to a suit or service, which by possibility will not fall within the time of limitation. Vide ante, (G 9.)

Nor, to a justification in replevin, for the statute mentions avowry and cognizance only. Bro. St. Lim. 67, 68.

(G 15.) Actions upon specialty, &c.

So, the st. 32 H. 8. 2. does not extend to actions founded upon a deed or specialty; and therefore if an avowry be for rent created by deed, it is not within the statute of limitations. Co. L. 115. a. 2 Ver. 235.

[But twenty years without any demand is of itself a presumption that a bond has been paid. 1 T. R. 270.]

[So, where twenty years' quiet and uninterrupted possession of ancient lights was deemed a sufficient ground, from which the jury might presume a grant. 3 T. R. 159.]

As, for a rent-charge.

So, if the lord confirms the estate of his tenant, to hold by 10s. where he held before by 20s. in avowry for the 10s. Cro. Car. 82.

So, if there be an avowry for rent upon a reservation; for the reservation will be the title. Co. L. 115. a.

So, if a rent be originally created by act of parliament. Cro. Car. 81.

So, by the st. 21 Jac. 16. debt limited to six years after the cause of action is, when it is not founded upon a specialty; and therefore debt for rent, reserved by indenture, is not within any statute of limitations; for it is founded upon a specialty. R. Hutt. 109.

Nor debt upon the st. 2 & 3 Ed. 6. 13. for not setting out tythes; for the statute is a specialty. R. Cro. Car. 513.

Nor, debt for an escape; for it is founded upon the st. 1 R. 2. 12. before which an action upon the case only lay. R. 1 Sand. 38. R. 1 Lev. 191. 1 Sid. 306.

Nor, debt upon an award. Semb. 1 Lev. 273. 1 Sid. 415. 2 Sand. 63.

Nor debt for a copyhold fine; for it is not founded upon a contract or lending. 1 Lev. 273.

Nor, an action by an assignee of commissioners of bankrupts. 2 Lev. 166.

Nor, debt upon a tally. Per Windh. 1 Sid. 306.

Nor, an action against a sheriff for money levied upon a *heri facias*. R. 3 Mod. 312.

Nor, a suit for a legacy. Mod. Ca. 25.

So, the st. 21 Jac. 16. does not extend to accounts current between merchant and merchant. 1 Lev. 287. 3 Mod. 312.

Nor, to a bargain between merchants, when there is no stated account. Semb. 1 Vent. 90. 1 Sid. 465.

Nor to a suit in equity by bill for an account of money received upon a trust. R. Ca. Ch. 26. R. 2 Vent. 345. D. Mod. Ca. 25. Eq. Abr. 303.

Nor, to a *rationabili parte bonorum*, though it sounds in detinue. R. Lit. 342. D. Mod. Ca. 26. R. Hut. 109.

Nor, to a suit for a charity. Eq. Abr. 304.

So,

So, the statute does not extend, where the action is commenced in an inferior court within time, though it be afterwards removed by *habeas corpus*, and there commenced *de novo*. R. 1 Sid. 228. Vide post, (G 17.)

Nor, where the action is commenced within time in B. R. and afterwards there is a bill in equity for the same demand. 2 Ver. 695.

The st. 21 Jac. 16. does not extend to an action for words in slander of a title. D. Ray. 61. Vide ante, (G 8.)

Nor to an action for words which are not actionable without special damage, if the damage, upon which the words become actionable, happened within two years. R. 1 Sid. 95. Per Twisd. 1 Sid. 85. Ray. 61. Cro. Car. 141.

Nor, to *scandalum magnatum*. Lit. 342. 1 Sid. 415.

Nor, to an action for words founded upon an indictment, or other matter of record. 1 Sid. 95.

Nor, to an action commenced in due time, but not revived, because no person proved the will of the defendant, or took out administration to him. 2 Ver. 695.

#### (G 16.) Action by an infant, &c.

So, by the st. 21 Jac. 16. no person entitled to a *formedon* or right of entry, who, at the time of such right of action or entry first fallen, was an infant, *feme-covert*, *non compos*, in prison, or beyond the seas, shall be barred of such action or entry, though the twenty years be expired; so as he or his heirs, within ten years after his being of full age, discover, of sound mind, enlargement, out of prison, return into the realm, or death, take the benefit of or sue forth the same, and not after ten years.

So, by the same statute, no person entitled to trespass, detinue, trover, replevin, account, debt, trespass for assault, menace, battery, wounding, or imprisonment, or action on the case for words, shall be disabled from such actions, by being at the time of such cause of action accrued under age, *covert*, *non compos*, in prison, or beyond seas, so as they take the same within the times by the said statute limited after coming of age, being discover, of sane memory, at large, or returned from beyond sea.

Nor, by the st. 4 Ann. 16. any person entitled to sue for seamen's wages, &c.

And if the plaintiff was in Ireland, that shall be *ultra mare* within this statute. Per Holt, Sho. 91.

So, all actions upon the case are within the benefit of this proviso. R. 1 Sid. 453. 2 Sand. 120. R. 2 Mod. 72.

*Assumpsit*, though it be not named. F. g. 81.

So, by the st. 4 Ann. 16. if any person against whom an action lies for seamen's wages, trespass, detinue, trover, &c. (or other actions mentioned 21 Jac. 16.) was beyond sea at the time of such action accrued, the plaintiff shall be at liberty to bring his action against him within the same time after his return as was limited for such action by the said st. 21 Jac. 16. and 4 Ann. 16.

So, it was before. R. 1 Lev. 143. Dub. 3 Mod. 312. R. cont. Sho. 99. Acc. Mod. Ca. 26. R. acc. per two J. Cro. Car. 246. 334. Richardson dub. & Cro. cont. Semb. cont. 2 Ver. 694.

[If plaintiff is in England when cause of action accrues, the time of limit-

limitation begins to run, though he afterwards goes abroad. Wils. 134.]

(G 17.) Or, brought within a year after judgment or outlawry reversed.

So, by the st. 21 Jac. 16. if judgment for plaintiff be reversed, or arrested after verdict, or defendant be outlawed, and the outlawry afterwards reversed, the plaintiff, his heirs, executors, or administrators, may commence a new action within a year after judgment or outlawry reversed, and not after.

So, if an action was commenced within six years, and the plaintiff dies, his executor or administrator may commence a new action, though six years are past, and show the special matter. Sal. 425. F. g. 171.

So, if an action in an inferior court within six years be removed by *habeas corpus* and the plaintiff there declares *de novo* after six years. R. Sal. 424.

Yet the new action by the executor or administrator ought to be recent; and the space of a year limited upon a reversal or arrest of judgment seems a reasonable time; and if the grant of a probate or administration be delayed, it must be shown. R. F. g. 170. 289.

(G 18.) Or, where promise or provision is made for payment.

So, if a man after six years acknowledge the debt due, and promises payment, it will be out of the statute of limitations. Pr. Ch. 386.

So, if by his will he directs all his debts to be paid. Pr. Ch. 385.

Or, makes a provision for payment of his debts generally. Ibid.

Or, publishes an advertisement in the Gazette, or other newspaper, that all debts owing by him, upon application at such a place, or to such a person, shall be paid. R. Pr. Ch. 385.

(G 19.) Pleading the statute of limitations, and the effect of the statute.

So, a man barred of an action by the statute of limitations must plead it, otherwise it shall not be intended. Cont. Cro. Car. 114. R. acc. Cro. Car. 141. 160.

So, if a verdict finds the action brought so many years after title accrued, it signifies nothing, if he does not find that no other action was brought. Sal. 422.

So, if a man be not ousted, or disseised, the statute of limitations does not take effect against him; as, if a stranger takes the profits with him, who has the right for twenty years. R. Sal. 423.

So, if a man be barred of an action by the statute of limitations, he shall take advantage of a title of entry, which afterwards accrues. R. Sal. 422.

Or, if there be a contract for an annual payment, and the plaintiff sues for the arrears for twenty years, the statute of limitations cannot be pleaded to the whole. R. Al. 62.

If A. converts goods beyond sea, and after six years he returns, and upon demand refuses the delivery, it will be a new conversion. Per three J. Cro. Car. 246. 334.

[Where the time of an act is material, it should appear to have happened within the limit. 5 East, 244. 1 Smith, 437.]

[Repugnancy in date can be objected to by spécial demurrer only, when laid under a *videlicet et postea*. 12 East, 459.]

[A repugnant date subjoined to the averment that the cause accrued before action commenced, is no ground for error. 2 East, 333.]

So, a man shall not be restrained, in a court of equity from pleading the statute of limitations to an action at law.

Though he exhibits a bill for relief in equity, but is dismissed, and the time incurs, pending his bill. R. 1 Ch. R. 205. 214. Dub. 3 Ch. R. 97.

[A bill depending in chancery almost six years is not such a demand, as to take a debt out of the statute of limitations. Anon. H. 1736, 2 Atk. 1.]

[The appointment of a receiver in chancery will not prevent the statute of limitations running on. Anon. H. 1737, 2 Atk. 15.]

## TENANCY.

### Entire Tenancy.

Vide ABATEMENT, (F 13.)

### General Tenancy.

Vide ABATEMENT, (F 12.)

## TENANT.

### Tenant to the praecipe.

Vide RECOVERY, (B 3, 4.)

### Tenant in common.

Vide ABATEMENT, (E 10.—F 6.) — CHANCERY, (3 V 4.) — DEVISE, (N 8.) — ESTATES, (K 8.)

### Tenant by curtesy.

Vide COPYHOLD, (K 1.) — ESTATES, (D 1, 2.) — WAST, (F 2.)

### Tenant in dower.

Vide DOWER, (C 1, 2, &c.) — WAST, (F 2.)

### Tenant in fee.

Vide COPYHOLD, (C 7.) — DEVISE, (N 4.) — ESTATES, (A 1, &c.) — OFFICER, (B 7.)

### Tenant in tail.

Vide CHANCERY, (4 S 1, &c.) — COPYHOLD, (C 8, 9.) — DEVISE, (H 8. — N 5, 6.) — DISCONTINUANCE, (A 4.) — ESTATES, (B 1, &c. 7, 8. 22, &c. 33.) — OFFICER, (B 8.)

**Tenant**

**Tenant after possibility of issue extinct.**

Vide ESTATES, (C 1, &amp;c.)

**Tenant for life.**

Vide COPYHOLD, (C 10.) — DEVISE, (N 7.) — ESTATES, (E 1, &amp;c.) — OFFICER, (B 9.) — WAST, (F 2.)

**Tenant for years.**

Vide ESTATES, (G 1, &amp;c.) — OFFICER, (B 12.) — WAST, (F 2.)

**Tenant at will.**

Vide ESTATES, (H 1, &amp;c.) — OFFICER, (B 11.)

**Tenant by sufferance.**

Vide ESTATES, (I 1, 2.)

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**TENDER.**

Vide ACTION UPON THE CASE UPON ASSUMPSIT, (H 8.) — CONDITION, (L 4.) — PLEADER, (2 G 2. — 2 W. 28. 49. — 3 K 23. — 3 M. 36.)

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**TENEMENT.**

Vide GRANT, (E 2.) — TRESPASS, (A 2.)

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**TENET ET TENUIT.**

Vide PLEADER, (3 O 3.)

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**TENTHS.**

- (A) Tenthg. infra.
- (B) Annates. p. 421.
- (C) Procurations. p. 422.
- (D) Pensions. p. 422.

**(A) Tenthg.**

The tythe or tenth of the annual value of any benefice was granted to the pope, *circa* 20 Ed. 1. according to the value then taken of every benefice. 2 Inst. 628. 1 Rol. 473.

And this was in imitation of the Levitical law, whereby the Levites pay a tenth to the chief priest. 2 Inst. 628.

But it seems that tenths were received of the clergy by pope Gregory 9., *anno* 1229. 13 H. 3. Forst. 12.

And granted by the clergy to king R. 1. *anno* 1189., for his expedition against the Turks. Sp. Gloss. *Decimæ Salad.*

By the st. 26 H. 8. 3. the king shall receive, as united to the crown, a yearly pension amounting to a tenth of all profits of every archbishop, bishopric, abbey, &c. deanry, hospital, college, &c. parsonage, vicarage, &c. within this realm.

And a commission shall go into every diocese to inquire the true yearly value of all manors, lands, &c. belonging to any bishopric, &c. or other benefice or spiritual promotion; and, after certificate by any three of the commissioners of the value and tax set of the tenth, every archbishop and bishop shall be charged with levying the same within his diocese, and process shall go against the archbishop or bishop for the same; and the bishop may levy it by ecclesiastical censures, distress, &c. on any rated in his diocese, whereon no replevin, prohibition, supersedeas on excommunication, &c. may be allowed.

And the incumbent, on default after demand at his church by the bishop or his officers, and forty days neglect certified into the exchequer under the seal of the archbishop, bishop, &c. shall be deprived *ipso facto* by the st. 2 & 3 Ed. 6. 20. of such benefice only.

And by such certificate the archbishop or bishop shall be discharged for so much, and process shall go against the incumbent.

And by the st. 32 H. 8. 22. on the oath of an archbishop, &c. charged with collection of the tenth, that he cannot, for sufficient cause alleged, levy any part of the tenth charged, and no matter shown to the contrary by the king's serjeant or attorney, the exchequer may discharge the accountant upon such allegation, or may award a commission to inquire the truth, and on return, &c. discharge him.

But by the st. 27 H. 8. 8., every spiritual person, on his composition, &c. for his first-fruits, shall have a deduction of his tenth for that year out of his first-fruits; but shall answer the tenth to the king.

And if a successor be charged with any tenth, arrear at the death of his predecessor, he may distrain the goods of the predecessor, remaining on his benefice, and, on non-payment in twelve days after, cause them to be appraised by two or three sworn appraisers, and sold for satisfaction of the arrears and his costs; or may sue by bill in chancery, or action of debt.

So, before a certificate of non-payment of tenths, there ought to be an express demand by a man authorised by the bishop, and therefore a demand by an apparitor is not sufficient. R. Cro. El. 80. Mo. 915. R. Mo. 541.

Or, sub-collector, &c. R. Sav. 1.

Nor, a demand to pay to another as his deputy. Cro. El. 81. R. Sav. 1.

Or, at any other place than his house or church. Cro. El. 81. Mo. 915.

Or, his stall in the choir, where the demand is made of a dignitary there. Sav. 1.

So, a certificate of non-payment is traversable, if there was not a due demand, &c. Cro. El. 80. Mo. 915. R. Mo. 541.

And

And if there be payment after demand, and before certificate, it will be void. R. Sav. 26.

[Vide 3 G. 1. c. 10. exempting archbishops and bishops from collecting the tenths.]

### (B) Annates.

The annates or *primitiæ* were the value of every benefice for the first year, which was paid to the pope by all archbishops and bishops, and began temp. Bonifacii 9. or Johannis 22. Cod. J. Eccl. 871. Spel. Gloss. Annates.

By the st. 6. H. 4. 1. it was enacted, that any who paid to the chamber of Rome for first-fruits more than was accustomed, should forfeit, &c.

By the st. 25 H. 8. 20. no archbishop or bishop shall pay annates, or other pension, &c. to the see of Rome.

By the st. 26 H. 8. 3. (repealed by the st. 2 & 3 Ph. & M. 4. but revived by the st. 1 El. 4.) every archbishop, bishop, abbot, master of college, hospital, dean, prebend, parson, vicar, or other having any spiritual promotion, to whose gift soever belonging, before any possession, or meddling with the profits of the benefice, shall pay or compound to pay to the king's use, on good sureties, the first-fruits, or one year's profit of his benefice, &c.

And the chancellor, master of the rolls, or other, to be named by commission under the great seal, may examine the true value, &c. and compound or agree for a rate for the first-fruits.

An obligation for payment shall be of the same effect as a statute-staple: and if any enter into a benefice, &c. without paying or agreeing, &c. he shall be taken as an intruder, &c. and being convicted by verdict, confession, &c. before the lord chancellor or other commissioners, shall pay for every offence double the value of the first-fruits.

And all first-fruits payable to the bishop of Norwich, or any other but the king shall cease.

By the st. 28 H. 8. 11. the year for which first-fruits are paid shall be computed from the avoidance of the benefice or spiritual promotion.

And by the st. 6 Ann. 27. bishops shall be allowed four years from the restitution of temporalities to pay the first-fruits, paying a fourth part of the composition each year; and if he, &c. be removed, shall be discharged of all not then payable.

By the st. 2 & 3 Ann. 11. the queen, by letters patent, may grant to the corporation, thereby to be erected, all the first-fruits and tenths, &c. for the maintenance of parsons, vicars, and curates of the church of England.

And all former statutes for payment, levying, discharging, &c. shall be in force.

And one bond only shall be given for four payments of first-fruits, and no fifth bond.

And the said first-fruits and tenths shall be answered and paid according to such rates and proportions only as the same have been heretofore usually rated and paid.

[Vide 1 G. 1. st. 2. c. 10.]

The value of benefices was assessed. 20 Ed. 1.

But the valuation, according to which the first-fruits and tenths are computed, was made 26 H. 8. pursuant to the above statute, and now remains in the exchequer. 4 Inst. 120.

But by the st. 26 H. 8. 3. a parson or vicar, whose benefice exceeds not eight marks, shall not pay first-fruits, unless he lives three years therein.

Nor, by the st. 1 El. 4. vicarages of 10*l.* per annum, or parsonages of 10 marks per annum, or under. 4 Inst. 120.

Nor, by the st. 5 Ann. 24. benefices not exceeding 5*l.* per annum improved value, which have cure of souls. Conf. by the st. 6 Ann. 27.

So, by the st. 26 H. 8. 17. a lessee of manors, lands, &c. of a bishop, or other spiritual person, shall not be chargeable to the king, but his lessor shall be charged for first-fruits, notwithstanding any covenant, &c. to the contrary.

By the st. 27 H. 8. 8., commissioners authorized to compound for first-fruits, may deduct the tenth (which yet shall be paid the king.)

The demand and collection of first-fruits and tenths by the pope was prohibited temp. Ed. 3. R. 2. & H. 4. 4 Inst. 120.

By the st. 32 H. 8. 45. the court of first-fruits and tenths was erected, but repealed by the st. 1 Mar. 10., and not revived by the st. 1 El. 4.

### (C) Procurations.

Procurations or proxies are paid by the clergy to the bishop or archdeacon in recompence of their visitation. Dav. 3. 6.

When the charge of the visitation became excessive, a sum was paid and accepted by antient composition in lieu of it. Dav. 3.

And therefore every benefice with cure is subject to procuration or proxy.

Though the composition does not appear; for it may be claimed by prescription or grant. Hard. 181.

But if there be a parsonage, and also a vicarage endowed, there shall be one procuration paid for both.

So, no procuration shall be paid for a donative; for it is exempt from the visitation of the ordinary.

Nor, for a chapel which depends upon a parsonage.

Proxies or procurations are collateral to the land, and not extinguished by unity of possession. Hard. 388.

If proxies or procurations are refused, remedy lies in the ecclesiastical court; for their jurisdiction is saved by the st. 34 & 35 H. 8. 19. Hard. 181. 388.

So, a bill in equity lies for the recovery. Dub. Hard. 181.

So, there shall be a remedy at law; if due by grant or prescription. Hard. 181.

### (D) Pensions.

So, upon resignation of a dignity or spiritual promotion, the person to whom the resignation is made, sometimes grants a pension to his predecessor. Vide Prohibition, (G 11.)

But by the st. 26 H. 8. 3. s. 22. a moiety of such pensions as exceeded 40*l.* was discharged, and the tenth of all other pensions.

And no such pension *in futuro* must exceed the third part of the value of the dignity or spiritual promotion.

## TENURE.

(A) All lands are held of the king. *infra.*

(B) But the king holds of no one. *infra.*

(A) All lands are held of the king.

By what tenures lands are held, vide in Homage.

To what services they are subject, *ibid.*

To whom the seigniorship belongs, and the incidents to it, vide in Seigniorship (A).

All lands and tenements in the hands of a subject are held immediately or mediately of the king. Co. L. 1. a. Wri. Int. 138.

And therefore, though the king releases to his tenant all services, yet he holds of him. 8 H. 7. 12. b. R. 9 Co. 123.

So, if an office finds a dying seised, but of what tenure is ignorant, and thereupon a *melius inquirendum* finds in the same manner, that is sufficient to entitle the king; for it shall be supposed that the tenure is of him. R. 2 Cro. 41.

So, liberties and things in gross may be granted to be held of the king, though not of a subject. Mo. 168.

(B) But the king holds of no one.

But the king holds of no one. Co. L. 1. b.

If lands held of the king, or of any other, are forfeited to the king for treason, the tenure is extinct. Bro. Parliament, 77. 6 Co. 5. b. 2 Rol. 514. l. 9.

And though the king afterwards grants the lands to another, the tenure shall not be revived in the hands of the patentee without express words.

Though there be a saving of all rights, rents, services, &c.; for these words do not revive it. Bro. Parl. 77.

So, if the king purchases land of another, the tenure is extinct. 2 Rol. 513. B.

Though the tenant ~~enfeoffs the king~~ and retakes the estate from him. 2 Rol. 514. l. 1.

So, if tenant ~~paravail~~ ~~enfeoffs the king~~, the ~~mesnalty~~ is extinct; for the ~~mesnalty~~ and estate ~~paravail~~ are but one estate. Dy. 154.

So, if tenant ~~paravail~~ makes a gift in tail, remainder to the king. R. Dy. 154. b. 2 Rol. 514. l. 5.

So, tenure of chauntries and other lands given to the king, by the st. 1 Ed. 6. 14., &c. is extinct, though there be a saving for the rights of all strangers, &c. R. Dy. 313. a. R. 1 And. 45.

Yet the lord of chauntries, &c. given to the king, may avow upon the

the land for his rent, though not upon the person, as within his fee. Dy. 313. a.

So, if the king grants lands forfeited, &c. the tenure may be revived by proper words; as, if he grants *tenend. de capitali domino per servitia debita*. R. 6 Co. 6. a. Bro. Tenure, 3.

*Feudum* originally was a portion of land granted by a prince, &c. to his officers or soldiers, upon a compact, express or implied, to render to his lord service and aid. Wri. Intr. 7.

And was revocable at will, afterwards granted for years, afterwards for life, and afterwards in perpetuity. Wri. Intr. 14.

Vide more concerning Tenure in Dignity, (C 2.)—Justices of Peace, (A 2.)—War, (B 1.)

### Tenure in burgage.

Vide BURROUGH, (E).

### TERM OF YEARS.

Vide ESTATES, (G 1, &c.)—PLEADER, (2 Y 16.)—RECEIPT, (A 1.)  
—RECOVERY, (B 8.)—REMITTER, (C 7.)

### Term to attend inheritance.

Vide CHANCERY, (4 G 5.)

### Trust of a term.

Vide CHANCERY, (4 W 19, &c.)

### TERMOR.

Vide RECEIPT, (A 1.—B 2.)—RECOVERY, (B 8.)

### THE TERMS.

Vide ADJOURNMENT, (A).—TEMPS, (C 1, &c.)

### TERRE-TENANTS.

Vide PLEADER, (3 L 14.)

### TESTAMENT.

Vide DEVISE.

TESTA-

## TESTAMENTARY MATTERS.

Vide PROHIBITION, (G 16.)

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### TESTATOR.

Vide ADMINISTRATION, (B 11.) — CHANCERY, (3 G 1.) — DEVISE,  
(N 21.)

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### TESTATUM CAPIAS, or FIERI FACIAS.

Vide PROCESS, (E 7.)

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### TEST ACT.

Vide OFFICER, (K 7.) — PLEADER, (2 S 28.)

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### TESTE OF A WRIT.

Vide ABATEMENT, (H 14.) — MANDAMUS. (C 4.)

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### TESTMOIGNE—EVIDENCE.

- (A 1.) What things are allowed for evidence; matters of record. p. 426.
- (A 2.) What shall be sufficient proof:—The record, or exemplification. p. 426.
- (A 3.) A copy, or witnesses, &c. p. 427.
- (A 4.) What proof is not sufficient. p. 428.
- (A 5.) A verdict, nonsuit, &c.:—When it shall be allowed. p. 428.
- (A 6.) What shall be sufficient proof. p. 429.
- (B 1.) A charter or deed under seal:—Private bailings. p. 429.
- (B 2.) When allowed, without proof. p. 429.
- (B 3.) When proof is necessary. p. 429.
- (B 4.) When the deed itself. p. 429.
- (B 5.) Recital, when evidence. p. 430.

(C) Pro:

**(C) Proceedings in courts, &c.**

(C 1.) A decree, sentence, &amp;c. p. 431.

(C 2.) A bill. p. 431.

(C 3.) An answer. p. 431.

(C 4.) A deposition. p. 432.

**Addenda.** p. 432.**TESTMOIGNE.—WITNESS.****(A) Witness ; who shall not be.**(A 1.) *Non Compos.* p. 447.(A 2.) *Infidel.* p. 447.

(A 3.) Person convicted of treason or felony. p. 447.

(A 4.) Or any infamous man. p. 447.

**Addenda.** p. 448.**(A 1.) What things are allowed for evidence ; matters of record.**

Evidence imports matters of record ; as, letters patent, fines, recoveries, &c. ; writings under, or without seal ; as charters, deeds, court-rolls, accounts, &c. testimony of witnesses, and other proof given to a jury. Co. L. 282. a.

And therefore letters patent may be produced in evidence.

A fine, or common recovery.

A judgment, statute, recognizance, or other matter of record.

So, a judgment and recovery in Wales, in a *quod ei deforceat*. R. Hard. 118.

Letters patent of land in a county-palatine under the seal of the duchy. 4 Inst. 209.

So, the pope's bull. Vide post, (A 2.)

So, by the st. 29 Car. 2. 8. a grant of augmentation to a vicarage, registered, examined, and attested by the bishop, &c. is a record.

**(A 2.) What shall be sufficient proof:—The record, or exemplification.**

If the record itself be produced, it shall be read without other proof.

So, letters patent under the great seal shall be read without other proof.

So, by the st. 3 (or 3 & 4) Ed. 6. 4. and 13 El. 6. patentees, and all claiming under them, may make title, &c. by shewing the exemplification, or constat of the roll.

And

And these statutes extend to all the king's patents which concern land, privilege, or other thing, granted to a subject, corporation, or any other. R. 5 Co. 53.

So, the chirograph of a fine is sufficient, without other proof. Pl. Com. 409. b.

Or, the exemplification of a fine.

So, the exemplification of a common recovery under seal is sufficient, without more.

So, an exemplification of a recovery in an inferior court of record under the town seal, where the records are consumed. Hard. 120. per Hale. 1 Mod. 117.

So, an exemplification of a recovery in ancient demesne, being old, if the records are lost. R. 1 Mod. 117.

And by the st. 27 El. 9. the exemplification of a recovery in Wales, or a county-palatine, shall be of the same validity to all intents as the original record.

So, an exemplification of any record under the great seal, or seal of the court, is sufficient. 10 Co. 93. a.

So, an exemplification of a record in Wales or a county-palatine, under the seal of the court there. Semb. Hard. 120.

So, an exemplification of the pope's bull, under the seal of the bishop, shall be allowed. R. Hard. 118.

(A 3.) A copy, or witnesses, &c.

So, a record may be proved by a copy examined with the original; for a rature or interlineation shall not be presumed. 10 Co. 92. b. 2 Rol. 678. l. 45.

Though it be a record in Wales, &c. it may be proved by an examined copy. R. Hard. 119.

So, a copy of a common recovery is sufficient, without proving a tenant to the *præcipe*; for it shall be intended well suffered, if the contrary does not appear. 2 Cro. 455. Lut. 1549. 1 Mod. 117.

Though it be a recovery of a reversion, if it be ancient, and the possession accordingly; for a surrender shall be intended. 1 Vent. 257.

So, if a record be lost or consumed by fire, it may be proved by collateral evidence; as, in ejectment for a rectory to which a recusant presented, the record of conviction being burnt, may be proved by the estreats in the exchequer. R. Hard. 323. 1 Sal. 285.

So, if appropriation or not be the issue, the king's licence being lost, may be proved by other evidence; for it is not directly the point in issue. R. Hard. 328.

So, in trover, if a *feri facias*, or *venditioni exponas*, &c. be lost. R. Hard. 323. Al. 18.

So, a recovery in ancient demesne being lost, and the roll not found, may be proved by witnesses, where the possession has gone accordingly. 1 Vent. 257. [2 Str. 1129. 2 Burr. 1072. 4 T. R. 514.]

So, a record may be explained by witnesses; as, what manor, person, &c. was intended, where there are several of the same name. Pl. Com. 85. b.

## (A 4.) What proof is not sufficient.

But, regularly, a record is of so high a nature, that it cannot be proved but by the record itself, or an exemplification, or copy thereof. 10 Co. 92. b.

So, the whole record, which concerns the matter in question, ought to be produced.

So, evidence to prove a record, which is lost or consumed, ought to be full and cogent. Hard. 324.

And therefore, a warrant for a *diem clausit extremum*, and an entry in the docket-book, is not sufficient proof of such writ. Hard. 120.

So, an estreat in the exchequer, and an inquisition upon it, is no proof of a conviction, where the estreat supposes it at the same assises at which the presentment of recusancy was made; for by the st. 23 El. 1. and 29 El. 6. proclamation shall be at the assises, when indicted, to render himself before the next assises, and therefore he cannot be convicted at the same assises. R. Hard. 323.

So, if a recovery of a reversion was suffered but ten or twelve years past, a surrender to make a tenant to the *præcipe* ought to be proved.

So, if there be probable evidence of an estate for life *in esse* in another; as, a lease, or mortgage by him. R. 5 Mod. 211.

## (A 5.) A verdict, nonsuit, &amp;c. :—When it shall be allowed.

So, a verdict in another action for the same cause shall be allowed in evidence between the same parties.

Though judgment was afterwards arrested for want of form. 2 Rol. 46.

So, it shall be evidence, where the verdict was for one under whom any of the present parties claim.

So, a verdict for or against a lessee shall be evidence for or against him in reversion. Per Holt, 6 Ann. Hard. 472.

So, a verdict for him in remainder shall be evidence for a subsequent remainder-man in the same deed; for though he does not claim under him for whom the verdict was, yet he claims by the same deed. R. 8 W. 3. B. R. (1 Ld. Raym. 730.)

So, a verdict for or against a plaintiff, with proof of the evidence by him given, shall be evidence in an action by another against him for the same thing; as, in an action by a common carrier for goods delivered by mistake, a verdict for or against the plaintiff, with the proof by him given, shall be evidence in an action by the owner against the carrier for the same goods. Per Holt, at Guildhall, 14 W. 3.

So, a nonsuit, with proof of evidence then given, shall be allowed as evidence against him in another action by the same plaintiff. R. 5 Ann. in C. B.

So, if the jury are agreed, and afterwards discharged before the verdict given and recorded, it shall be allowed for evidence, that the jury were agreed, in the case of a common person. R. 2 Rol. 680. l. 5.

(A 6.) What shall be sufficient proof.

If a verdict be offered in evidence, it ought to be proved by an exemplification of the verdict, and judgment upon it. (Vide Hard. 118, &c.)

(B 1.) A charter or deed under seal :—Private bailings.

So, any charter, or deed under seal of the party, shall be allowed for evidence.

So, a deed inrolled by consent of one party only, shall be evidence against him, and all who claim under him. 3 Lev. 388.

So, a deed which begins, this indenture, shall be evidence though it be not an indenture. Per Hale, at Norfolk assises, 1668.

So, a deed shall be evidence, though by accident, &c. the seal be broken, or torn off. Pal. 409. 1 Mod. 211. Per B. R. 12 W. 3.

Though cancelled by practice. (Vide 1 Vent. 297.)

So, a counterpart, where it is proved that there was an original, and that cannot be had. (Vide 1 Sal. 287.)

(B 2.) When allowed, without proof.

An ancient deed, dated forty years past, shall be read, without other proof.

So, a deed, indorsed, as inrolled, shall be read, without proof. R. P. 6 W. & M. in B. R. 1 Sal. 281.

Though there was no need of an inrolment to make such deed effectual. 1 Vent. 296. 3 Lev. 388. 1 Sal. 280.

So, the counterpart of a deed to declare the uses of a fine. Mod. Ca. 225. 1 Sal. 287.

(B 3.) When proof is necessary.

But, regularly, a deed shall not be given in evidence, without proof of the execution. 10 Co. 93. a.

Proof of the execution ought to be by one of the witnesses at least.

Or, if it be proved that they are all dead, or upon strict inquiry cannot be discovered to be alive, by proof that the name of any one indorsed is the writing of the same person. Per Holt, 5 Ann.

Or, that the name of the party, who executed it, is his proper handwriting.

Or, by any one present at the execution of the deed, though he be not indorsed as a witness.

(B 4.) When the deed itself.

So, regularly, the deed itself ought to be produced, whereby it may appear to the court that it is not razed or interlined. 10 Co. 92. b.

And therefore, generally, a copy of a deed shall not be allowed for evidence, though examined and attested. Ibid.

Though wrote by counsel as a true copy, and delivered to the party as such. 1 Mod. 94.

So, proof of the contents by witnesses shall not be allowed. 10 Co. 92. b.

Nor,

Nor, a counterpart, without circumstances which induce credit that there was an original. R. 1 Sal. 287.

But a counterpart has been allowed, where the original cannot be found, and there is probable proof that there was an original; as, a counterpart of a lease, where the lessor himself acknowledged that he made a lease, of which this was a counterpart. Per C. B. 6 Ann.

So, a counterpart of a lease, found by the heir of the lessor among the writings of the ancestor. 1 Lev. 25.

Though no witness be indorsed. Ibid.

So, if it be proved that the original was assigned to the defendant or another under whom he claims. Per Tracy, 6 Ann.

Or, that the original is destroyed or lost. R. Mod. Ca. 225.

So, if a deed be destroyed or lost, a copy may be allowed. 10 Co. 92. b.

Though not examined; if it was written for a true copy. 1 Mod. 4.

So, proof of the contents by witnesses may be allowed in such case. 10 Co. 92. b.

So, a copy, or proof of the contents has been allowed when a deed was embezzled, or detained by the other party. 1 Keb. 12. 3 Keb. 2.

#### (B 5.) Recital, when evidence.

So, a recital in a deed may be evidence, against him who executed, or claims under the party, who by such recital is estopped; as, the date shall be evidence that it was executed the same day. Per Holt, (Vide 1 Sal. 286.)

A recital of a jointure to A. that there was a jointure to her. Per Tracy, 7 Ann.

So, a recital of a deed is evidence of it, where the deed recited is lost. R. Mod. Ca. 45.

So, a recital of a lease for a year in a release shall be proof that there was such lease, if possession has been accordingly for several years. Per Gould, 12 W. 3. at Hertford. R. 2 Ann. 1 Sal. 286. Mod. Ca. 44.

But a recital, generally, is no proof of the deed recited; as, if a patent or lease be recited, the patent or lease ought to be proved. R. Hard. 120. Semb. Vau. 74. R. 2 Lev. 108.

So, if a patent be recited to be surrendered, and the patent be proved by one party as *in esse*, the other ought to prove the surrender. 2 Rol. 678. l. 40. R. 2 Vent. 171.

Yet if the one relies upon the recital as proof of the patent, it shall be also proof of the surrender. R. 2 Vent. 171.

So, a recital of a *levari* or other record, in a record, is no proof of the *levari*, &c. Per Hale, 23 Car. 2. Sir P. Pindar; if the record of the *levari* is not lost.

So, a recital of a lease in a release, is no proof against a stranger, without shewing that the lease is lost. R. 1 Sal. 286.

Nor, a recital of a deed for the uses of a fine, without proof that there was a deed of uses. Mod. Ca. 45.

#### (C) Pro-

(C) Proceedings in courts, &c.

(C 1.) A decree, sentence, &c.

So, writings without seal are oftentimes evidence.

As, all proceedings in courts of justice.

And therefore, a decree in the court of chancery, or exchequer, shall be evidence against the party, if an exemplification of it be produced under the seal of the court. 1 Keb. 21. 2 Mod. 231.

Or, a decretal order in paper, with proof of the bill and answer. 1 Keb. 21.

So, if the bill and answer be recited, it is sufficient. Cont. 1 Keb. 21. Semb. per Trevor at Guildhall, 9 Ann.

But a decree, which does not recite the bill and answer, shall not be allowed. Per cur. Twisd. cont. 1 Keb. 21.

So, a sentence in the spiritual court, in a matter within their cognizance, shall be evidence of the right to the thing there decreed; as, a sentence for tithes. R. 2 Rol. 679. l. 25. 2 Mod. 231.

A sentence in the admiralty, which condemns goods as piratical, in trover for the same goods, upon the libel and answer produced shall be evidence. Per Trevor, 9 Ann.

Or, without producing the libel, if it be not found in the office, nor usually filed there. Per Trevor, Ibid.

So, a probate of a testament for personal estate, and a grant of administration.

So, a judgment in a court baron, hundred, or county-court, with proof of the proceedings upon which the judgment was given.

(C 2.) A bill.

So, a bill in chancery, or exchequer, shall be evidence against the plaintiff himself, if it was exhibited with his privy. 1 Sid. 221. R. Ca. Ch. 65.

And if there was answer, and other proceeding upon it. Ca. Ch. 65. 1 Sid. 221.

And the proceedings upon a bill import, *prima facie*, that it was with his privy. Per Tracey, 5 Ann.

(C 3.) An answer.

So, an answer by any in chancery, in his own right, shall be evidence against himself, with proof of the bill filed. Godb. 326. Vide Chancery, (T 6.)

So, an answer to interrogatories is evidence against himself.

So, an answer to a libel in the spiritual court; for it is tantamount to a confession. Per Tracey, 6 Ann. 1 Ver. 53.

But an answer by guardian shall not be evidence against the infant. R. 2 Vent. 72. 3 Mod. 259.

Nor, an answer of a trustee against the *cestuique* trust. 1 Keb. 281.

Nor, the answer of a vendor against an alienee. 1 Sal. 286. Mod. Ca. 44.

If an answer be read in part against him, he may insist that the whole shall be read. R. 5 Mod. 10.

(C 4.)

## (C 4.) A deposition.

So, a deposition, regularly taken upon a bill and answer in chancery, shall be evidence against the party to the suit, or any who claim under him, if the bill and answer are proved to be filed. 1 Keb. 685. 4 Mod. 146. 1 Sal. 279. Vide Chancery, (T. 4, 5.)

Though the bill was dismissed for want of equity. Ca. Ch. 175. Per Holt, 7 W. 3.

So, if it be proved that a bill and answer were filed, by the six clerks' book, by mentioning them in the enrolment of the decree, it is sufficient, though they are now lost. R. 5 Mod. 211.

So, an exemplification of an ancient deposition was allowed where the records were burnt, though the bill and answer were not recited; for the recital was not usual before 1630. 2 Keb. 31.

But a deposition shall not be evidence at law, except where the witness is dead. 1 Sal. 286.

Or, cannot attend by reason of sickness, or cannot be found. Sho. 363.

Though the witness afterwards becomes interested, whereby he is disabled to be a witness. R. 2 Ann. 1 Sal. 286. [Vide 2 Ver. 700. 1 P. W. 288, &c. 1 Str. 101.] Vide Testmoigne, (C 1, &c.)

Nor, against him who is no party to the suit, nor claims under one. Hob. 112. 2 Rol. 679. l. 35.

Nor, for a stranger, against a party to the suit; for, not being evidence against him, it shall not be allowed for him. R. Hard. 472.

Nor, for a stranger to the suit against a purchaser under the party; though the cause there was of the same nature as now. Hard. 22.

So, it shall not be evidence, if the bill was dismissed for irregularity. R. Ca. Ch. 175.

If taken *ex parte*, without answer to the bill. 2 Jon. 164.

Though the bill was *ad examinandum in perpetuum rei memoriam*. R. Ray. 336. Dub. 1 Sal. 279. Sho. 363.

**Addenda.**

*Acknowledgment.*—Admissions by one party to a suit are evidence in favour of the other, though he is a nominal party only, a trustee for the benefit of a third person. 7 T. R. 663. Id. 670.

To prove the plaintiff's demand satisfied, the defendant may give evidence of an admission by the plaintiff to that effect; though it should appear that the plaintiff also signed a receipt. 1 East, 460.

Evidence of the declarations of a man since dead, as to a fact done by himself, is not admissible. 1 Anst. 299.

The admission by a party of the right of another cannot be used as evidence against him, without making his simultaneous assertion of his own right evidence also for him. 5 Taunt. 245.

Where a defendant, in the course of the transaction on which the action is founded, has admitted the title by virtue of which the plaintiff sues, it amounts to presumptive evidence that the plaintiff is entitled to sue. 1 N. R. 196.

Accounting with one as farmer of the tolls of a turnpike, who has assumed that character by consent of those concerned, estops the party from disputing the validity of his title, when suing by account stated for those tolls. 10 East, 104.

If slander implies a charge that the plaintiff was not qualified to act in the particular character which he assumed, he ought to prove his qualification; and

and it will not be sufficient to shew that he acted in that capacity. 8 T. R. 303.

Where words imply merely ignorance or negligence, without admitting the plaintiff to be qualified, and the plaintiff avers that he is qualified, he will be bound to prove his qualification. 1 N. R. 204. 210.

In an action for charging the plaintiff with being a swindler, and threatening to have him struck off the roll of attornies; held, that defendant's threat amounted to a distinct acknowledgment that the plaintiff was an attorney, and dispensed with further proof. 4 T. R. 366.

In an action for defamation, the plaintiff averred that he was a physician, and exercised the profession, and that the words were spoken concerning him as a physician. The facts were, the plaintiff having practised the profession of a physician, was called upon to attend a sick person, for whom he prescribed: the defendant was employed as apothecary, and made up the prescription: in this situation of things the defendant spoke the words charged in the declaration, which did not impute to the plaintiff any want of qualification by degree, but called him by his professional title of doctor, and ascribed to him malpractice in his treatment of the patient. Qu. Whether the plaintiff was bound to prove that he was regularly graduated? 1 N. R. 196.

*Administration.*—Exemplification under the archbishop's seal of administration, with the will annexed, is a good evidence though it only recites the fact, and sets out the will *in hæc verba*. B. R. H. 108.

Copy of the act book of the ecclesiastical court is evidence of administration, and in the first instance. 8 East, 187. 13 East, 232. Id. 238.

*Admiralty.*—A sentence of condemnation of a neutral by a British vice-admiralty court, is sufficient evidence whence to presume that the ship condemned had been engaged in some illegal transaction, though the ground of condemnation do not appear in the sentence. 1 Mars. 39.

A case on the construction of a sentence of condemnation, wherein the conclusion deduced was, that the vessel was condemned, not because not properly documented, but from having simulated papers. 15 East, 364.

If the acts of condemnation of a ship in admiralty court abroad are lost at sea, parol evidence shall not be allowed of the reasons of condemnation, what was lost being only copy of evidence. B. R. H. 304.

A sentence of reversal, by giving costs to the captor, does not decree the original seizure to have been justifiable. 13 East, 304.

The sentence of a foreign prize court, of competent jurisdiction, on the ground of infraction of treaty, however unwarranted, is conclusive. 5 East, 99. 3 B. & P. 499.

A sentence of condemnation by a foreign court, of competent jurisdiction, proceeding specifically on the ground of infraction of the treaty between their own nation and that of the captured, is conclusive that the treaty was broken, though inferences in aid of such infraction were drawn from *ex parte* ordinances. 5 East, 99.

All the sentences of foreign courts, of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence (in actions upon policies of insurance, e. gr.) on every subject immediately and properly within the jurisdiction of such courts, and upon which, through whatever media, they have professed to decide judicially. 5 East, 155. 1 Smith, 372. 2 Taunt. 85.

The sentence of a foreign court of admiralty is conclusive against all the world, in all civil suits, as to all matters within its jurisdiction, and decided by the sentence. Dougl. 575.

A foreign sentence of condemnation is evidence of the facts inducing the condemnation, and upon which the condemnation proceeds, as of the judicial act of condemnation itself. 14 East, 392.

The sentence of a foreign prize court is evidence only of the conclusion on

which the condemnation proceeded, not of the facts stated by way of evidence. 3 T. R. 192.

A foreign sentence of condemnation, because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship which had been seized and carried into port by a belligerent power, for the purpose of search, is conclusive of a breach of neutrality. 8 T. R. 230.

A French sentence, condemning an enemy's property, a ship warranted American, "for want of a list of the crew, as required by a French ordonnance, and requisite within the meaning of the treaty of commerce between France and America," was held conclusive against the warranty. 7 T. R. 681. 8 T. R. 230.

The sentence of a foreign court of admiralty, proceeding upon the ground of the property not being neutral, is conclusive against the assured, that he has not complied with his warranty. 3 B. & P. 201. 499.

A sentence of condemnation, proceeding on the ground of the want of a foreign court of admiralty, is not conclusive evidence that they were not neutral, unless it appear that the condemnation went on that ground. Dougl. 575.

Where the grounds of a foreign sentence of condemnation are detailed therein, and they lead to a different conclusion to that by which alone the sentence would be justified, it is void. 7 T. R. 523.

A condemnation before the consul of one belligerent state, resident in another, in alliance offensive and defensive with it, has the same effect as if taken in the state appointing the judge who condemns. 2 East, 473.

A sentence of condemnation pronounced by an enemy's prize court, holden in a neutral country, is a nullity. 8 T. R. 268.

Sentence of a foreign admiralty condemning a ship as unfit, cannot be read in an action on the charterparty, which is a contract under seal at land. Str. 1078.

The sentence of a foreign court of judicature, touching the construction of an English policy, is not binding, since that can only be determined by the particular law of England. 1 T. R. 323.

A foreign sentence, condemning a neutral vessel for the breach of an *ex parte* ordinance of the foreign state, but to which the neutral had not assented, is void. 8 T. R. 434. Id. 562. 1 East, 663.

A condemnation by the enemy of a neutral ship, for the breach of an *ex parte* ordonnance, is void. 16 East, 176.

A case in which a foreign sentence was held of no avail, as between the underwriter and assured, from the construction given to a memorandum on the policy. 3 B. & P. 499.

*Affidavit*.—An affidavit filed in court on a motion may be read in evidence at the sittings in the same court, without proof of its being sworn. 2 Bl. 1190.

*Affirmative and negative*.—The point in issue is to be proved by the party who asserts the affirmative. 4 T. R. 33.

The negative of any question must be proved by the party asserting it, where the law presumes the affirmative. 3 East, 192.

Where one party charges another with a culpable omission, or breach of duty, he must prove the charge, though it may involve a negative. Hence, in an action by the owner of a ship, brought against the defendants for putting on board combustible articles, "without giving due notice thereof;" held, that it lay upon the plaintiff to prove this negative averment. 3 East, 192.

It is a general rule, that averments, the falsehood of which lies wholly within the knowledge of one party, will be taken for granted until he shews to the contrary. 1 T. R. 648.

Where issue is upon the life or death of a person, the proof lies upon the party who asserts the death. 2 East, 312.

Allow-

*Allowance in eyre.*—Two allowances in eyre temp. Ed. 1. and judgment in trespass temp. Ed. 3. are not conclusive evidence of a right to wreck, and usage for 92 years last is stronger. 2 Wils. 23.

*Answer.*—Statements as hearsay are not evidence for deponent, on answer produced against him. 2 B. & P. 542.

*Articles of war.*—Proof of articles of war may be by those purporting to be printed by the king's printer. 5 T. R. 436.

*Army Commissioners.*—Certificate of the commissioners for stating the army debts, conclusive. Str. 481.

But it must be signed by them sitting upon the commission. Str. 568.

*Assignment.*—As against the assignee of an estate, documents relating thereto are presumed to have been handed over to him; hence, secondary evidence is admissible after notice. 16 East, 91.

A plaintiff producing the original lease of a long term, and proving possession for the last seventy years, all mesne assignments will be presumed. 2 Blk. 1228.

*Award.*—A copy of an award, the original being lost in a mail robbed, is evidence. Str. 526.

*Bankruptcy.*—The depositions of the act of bankruptcy, when recorded according to the st. 5 G. 2. c. 30. s. 41. are evidence in an action of law to prove the precise time when the act of bankruptcy was committed, if specified therein. Dougl. 257.

Though taken fifty years before. Str. 920.

So in an action against the assignee of a bankrupt for a creditor's share under an order of commissioners of bankrupts for a dividend, the proceedings before the commissioners are conclusive evidence of the debt. Dougl. 407.

Entry in a bankrupt's books, before the act of bankruptcy, is evidence. B. R. H. 378.

In an action by the assignees of a bankrupt, the bankrupt's declarations at the time of his absents himself from home, are evidence to shew his motive. 5 T. R. 512.

Where, to an action by the assignees of a bankrupt, for a debt due to the bankrupt's estate, the defendant set off notes in his possession issued by the bankrupt before the bankruptcy; proof that notes to the amount of the set-off came into his hands three or four weeks before the bankruptcy was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced. 2 Mars. 209. 6 Taunt. 517.

Where a party, on his examination before commissioners in bankruptcy, produced a bill of sale from the bankrupt, and admitted the execution of it in his deposition, that was held sufficient evidence of it against him in trover, brought afterwards by the assignees, for the goods taken under it. 5 T. R. 366.

*Baron and Feme.*—A married woman, separated from her husband, becomes entitled to an estate, the premises having been devised to a trustee, to pay unto or permit her (then single) to receive the profits. The trustee for several years receives rent expressly for her use, from a person in possession, which he pays her. Held, that an authority from the husband to recognize the party as tenant might be presumed. 1 Taunt. 367.

*Bastard.*—On a question of legitimacy, the declarations of deceased persons supposed to have been married (who might themselves be examined, if alive) are admissible to disprove the fact of marriage. 6 T. R. 330.

Sentence in ecclesiastical court for fornication, &c. in a criminal way is not evidence against the issue, otherwise if a sentence on the point of the marriage and no collusion. 2 Ves. 243.

*Bill in equity.*—A bill in equity is evidence only of its own existence, and that its contents were in issue. 7 T. R. 2.

*Boundaries.*—Hearsay evidence is admissible on a question of parochial or manorial

manorial boundary, although the persons who had been heard to speak of the boundary were parishioners, and claimed rights of common on the very wastes which their declarations had a tendency to enlarge. 14 East, 331.

*Collateral facts.*—In order to shew the necessity of calling in the aid of the military to execute process, proof of acts of violence by the mob, collected in another quarter, but collected for the same purpose as those about the plaintiff's house, is admissible. 14 East, 183.

*College sentence.*—A sentence of expulsion from a college in one of the universities is good evidence, unless reversed by appeal; and while it continues unreversed, no evidence can be admitted to prove its irregularity. Cowp. 315.

*Commissioners.*—The judgment of commissioners directed by statute to be final, cannot be questioned in a collateral proceeding. 2 B. & P. 391.

*Common.*—On a question, whether certain lands, which had been approved from a waste, were subject to a right of common, several counterparts of old leases, kept among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from any such charge, were allowed to be evidence for the plaintiff claiming under the lord of the manor, though possession under the leases was not shewn. 5 T. R. 412.

*Comparison of hands.*—Evidence by comparison of hands is admissible where from lapse of time no better evidence is attainable. 7 East, 282. a. 14 East, 328.

*Construction.*—The construction of writings is for the court, not the jury. 1 T. R. 172. Id. 674.

*Conviction.*—No record of a criminal conviction can be given in evidence in a civil suit; for it might have been on the evidence of a party interested in the civil suit, B. R. H. 311. Therefore if A., convicted of forging a note from B. to himself, sues for other notes from B. to his intestate, and reads a deposition of a dead witness to prove B.'s owing the notes in question, and the same witness has sworn to B.'s owning the forged notes yet the record of conviction for forgery cannot be read, but the forged note may, and the marks of forgery shewn. Ibid. Vide in tit. Justices of Peace.

*Copy.*—And on refusal to produce an instrument after notice, secondary evidence is admissible, whether in criminal or civil suits. 2 T. R. 201. n. Id. 199.

And even such notice is unnecessary, when from the nature of the proceeding the one party is aware that the other means to charge him with the possession of it. 14 East, 274. 4 Taunt. 865. 3 B. & P. 143.

The notice to produce should be given to the suitor's attorney, even in criminal suits. 2 T. R. 201. 3 T. R. 306.

And where a loss is supposed, proof that no place or person can be discovered, dispenses with search. 4 M. & S. 48.

A deed consisted of two parts, of which one was destroyed, and the person having the other, had said he could not find it. He was not subpoenaed. Held, that parol evidence was inadmissible. 6 T. R. 236.

An apprenticeship deed consisted of one part, in possession of the apprentice, who, on application shortly before he died, said he had burnt it; the executrix of the master said she knew nothing about it. Secondary evidence was held admissible, without further search. 4 M. & S. 48.

Defendant in ejectment refusing to produce the lease in her custody, an attorney who had read it was allowed to give evidence of the contents. Str. 70.

Where an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence. 3 Salk. 154.

A survey of a religious house (in the first fruits office), though the commission is lost. 1 Wils. 170.

The copy of an old agreement, where the original is in the Bodleian, whence the Oxford statutes prohibit it to go out. Bunb. 189.

Public writings may be proved by the original. 16 East, 208.

Though a stamp be imposed upon the copy. Ibid.

Public writings may be proved by an examined copy: thus, an entry in land-tax assessment book. 2 T. R. 234.

An answer may be proved by an examined copy. 16 East, 334.

The copy of a copyholder's admittance of thirty years standing is evidence, though not signed by the steward. 2 Atk. 44.

Proof of East India Company's transfer books may be by copy. Dougl. 593. n.

Marriage registers may be proved by copy. Dougl. 174. 594. n.

*Corporation-books.*—Corporation books, when publicly kept as such, and the entries made by the proper officer, are evidence. Str. 93.

Corporation books are not evidence for the corporation against a stranger. 1 H. B. 214.

Copies of corporation books, or of a poll, are evidence; and in that case B. R. will not order the original to be produced without particular reason. Str. 307. Willes, 422.

A letter fifty years old found in the corporation chest, is not a corporate act, so as that a copy of it may be evidence, but the original must be produced. Str. 401.

*Counterpart.*—The averment that “by an indenture” may be proved by the part executed by the defendant. 5 T. R. 465.

*Court Rolls.*—The court rolls of a manor are evidence of the mode of descent, though no instances are shewn. 5 T. R. 26. Of customs. 10 East, 520. But presentments by homage restricting the lord's right, in respect of parcel of his demesne land, to turn so many cattle only on the waste, not acted on, have no weight against a uniform contrary usage. 2 M. & S. 440.

*Court-martial.*—Sentence of acquittal by a court-martial is not evidence of the illegality of an imprisonment. 4 M. & S. 400.

*Crown licence.*—The contents of a licence from the crown, when lost, must be proved by the registry at the secretary of state's office. 2 Taunt. 237.

*Custom.*—Usage, when evidence, though not ancient, yet unopposed by opposite testimony, is conclusive. 6 T. R. 430.

Reputation is evidence on questions respecting general customs concerning parishes or manors, or the inhabitants of towns and other places. 14 East, 327.

To prove the manner of conducting a particular branch of trade at one place, evidence may be given of the manner of conducting the same branch at another place. Dougl. 510.

In a question upon the custom of tithing in the parish of A., evidence that such a custom exists in the adjacent parishes, is not admissible. Secus, if the custom be laid as the general custom of the whole country. Cowp. 807.

Where a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not admissible evidence. Cowp. 807. Dougl. 512. 12 East, 63.

In an action for a trespass on a close, parcel of a common, defendant justified for a prescriptive right of common at all times over the place, &c. and the plaintiff in his replication prescribed, to use the place for tillage, &c. qualifying the defendant's general right. Held, that reputation was admissible to support such prescriptive right of tillage; which affected a large number of occupiers within the district. 1 M. & S. 679.

Question is, whether there is a custom within a manor, of barring entails by surrender. In support of a single instance of a surrender by a tenant in tail, to the use of a third person in fee, which tenant died about 13 years ago, is shewn. Against it, an instance in 1736 is proved of a recovery suffered by a tenant in tail. Held that there was evidence whence a jury might presume such custom. The surrender was an act done in open court, and has since never been controverted. 2 M. & S. 92.

Where it is contended that, by the custom of a manor, land shall descend to the eldest female heir, general reputation of such custom, and instances of its having so descended, on some occasions, is evidence proper to be left to a jury,

though the descent contended for in the particular instance is not exactly similar to any of those that are adduced in evidence, as where the estate is claimed by the grandson of an eldest sister, and the instances proved are only of descents to eldest daughters and eldest sisters. 12 East, 62. 1 T. R. 466.

The customs of one manor allowed as good evidence of the customs of another manor in the three northern counties, because antiently they made one earldom. Fort. 41, 44. N. B. The judges of C. B., barons of Exchequer, declared afterwards that the customs of other manors ought not to have been admitted as evidence. Str. 654. Vide Acc. Doug. 495.

The custom of archdeaconries in the same diocese, is not evidence of a custom in another. Str. 957. a.

In a suit between a copyholder and his lord, the copyholder rests his case upon an immemorial custom of the manor, the existence of which the lord denies. At the trial the lord produces the record of a suit by bill in the exchequer, 4 W. & M. wherein the parties litigant are described as lord and copyholder (of the self-same manor), and the parties deposing for the copyholder are so described, that if the description be only true, they are legally competent to give evidence touching the custom of the manor. Their depositions go to prove a custom inconsistent with that relied upon by the now plaintiff; and to disprove the existence of such last-mentioned custom, the lord offers them as evidence. Objected, 1. That the present parties were not privies to the record of the former suit, and therefore could not be affected by any matter therein contained; it was *res inter alios acta*. 2. Or supposing that the depositions were admissible as evidence of reputation, still that it must be shewn that the parties were invested with the characters described in the depositions, and having which alone were they competent to depose. 3. Or, even waiving the two former objections, that the depositions were inadmissible evidence, being declarations made *post litem motam*. Objections over-ruled, because, 1. The depositions were not offered as a record estopping the plaintiff, but as declarations of deceased persons, touching a reputation or received opinion; their simple assertions would have been evidence; *a fortiori* those made under the sanction of an oath. 2. That at this distance of time, the fact that the witnesses were clothed with the character in which they deposed must be taken for granted; else it would be requiring a proof which, in all probability, it were impossible to adduce. 3. The two customs, the one litigated in the former, the other in the present suit, are different; the declarations therefore, though made after the first custom was questioned, were made before the controversy touching the present was raised. 4 M. & S. 486.

**Customary.**—The customary of a manor handed down with the other muniments, though not signed, is evidence of a custom. 1 T. R. 466.

**Character.**—In a civil action the character of the defendant cannot be gone into. Anon. Loft. 321.

On an information in the exchequer, evidence to character is inadmissible. 2 B. & P. 532.

Where a party is allowed to give general evidence of character, he cannot enter into particular instances. 1 T. R. 754.

**Death.**—In establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient, *prima facie*, to shew that the person has not been heard of for many years, 1 Blk. 405.

Proof by one of the family that a particular person had, many years before, gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married; held presumptive proof of his death without lawful issue. 15 East, 293.

**Decree.**—A decree in equity is inadmissible without bill and answer, where it recites proceedings in part only. Doug. 580.

But it may be proved by copy. Cowp. 17.

In an action on a wager whether a decree of the court of chancery would be reversed

reversed on appeal to the house of lords, a copy of the reversal is sufficient evidence, without producing the minute book itself; such copy need not be on stamps. Cowp. 17.

*Deposition.*—The deposition of a person examined in chancery may be used in a suit of law between the same parties if he is dead, cannot attend through sickness, or is not amenable. 1 Atk. 445.

The court will not give leave for witnesses, prisoners in execution, to be examined, and their depositions read in evidence without consent. Barnes, 222, 223.

No examination shall be read, though signed by a magistrate, unless signed by the party. B. R. H. 306.

*Duplicate.*—Proof of attorney's bill and duplicate original is admissible. 2 B. & P. 237.

So in the case of a notice on demand. Id. 39.

*Election.*—The original precept from the sheriff to the returning officer of a borough to proceed to an election, is admissible evidence to prove the allegation in a declaration that such a precept issued, &c. Willes, 422.

*Entries and declarations.*—The declarations of deceased persons are admissible in cases where they appear to have been made against their interest; as, entries in their books charging themselves with the receipt of money on account of a third person. 4 T. R. 514. 669.

Declarations by a deceased tenant, who held under both A. and B. are admissible to prove whether certain lands are parcel of A.'s or B.'s estate. 2 T. R. 53.

To prove seisin in a devisor, the declarations of a deceased occupier of land that he held as his tenant, are admissible evidence. 2 T. R. 55.

The declaration of a deceased occupier of land, that he rented it under a certain person, is evidence of that person's seisin. 4 Taunt. 16.

Admissions by the deceased, that a chattel claimed as a heriot by custom was given by her to A., are evidence for A. against the lord. 1 Taunt. 141.

In ejectment by the first tenant in tail, under a settlement (by which an estate was limited to A. for life, remainder to B. for life, remainder to C.'s eldest son for life, remainder to C.'s eldest son in tail, &c. with a power to the tenants for life to grant leases, on condition of reserving the antient rent) against the defendant who claimed as lessee of C. to recover a part of the estate, which as the lessor of the plaintiff complained, had been demised for less than the antient rent. Held, that a letter addressed to B. by one intimately acquainted with the property, purporting to be a particular account of the antient rents at that time, and recognized as such by B., and preserved by the successive owners of the estate, was admissible against C., a succeeding tenant for life. 3 Smith, 254. 7 East, 279, 290.

Where the question is, whether a certain waste is the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons, in satisfaction of trespasses committed on the waste, are evidence to shew that the right to the soil is in his master, under whom the plaintiff claims. 4 T. R. 514.

Entries by deceased officers of a township, of the receipt of money from the officers of another township, for a proportion of the church rates, are admissible to prove the liability of the township paying to repair. 4 T. R. 669.

Where the question was, whether certain lands described in ancient title-deeds were the same for which certain rents had been at several times paid, held that entries made by a deceased person under whom defendant claimed, acknowledging the receipt of rent for the premises in question, were not admissible evidence for the defendant. 5 T. R. 121.

A written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger, in which a charge for his attendance is marked as paid, is evidence upon an issue as to the child's age. 10 East, 109.

A paper signed by many deceased copyholders of a manor, importing ~~what~~ was the general right of common in each copyholder, and agreeing to restrict it, is evidence of reputation, even against other copyholders not claiming under those who signed it. 13 East, 10.

Acts of ownership exercised over one part of a waste, are evidence to rebut a presumption that another was inclosed by grant from the lord. 1, Taunt. 208.

An entry in an attorney's debt book may be read after his death to prove that a deed was made. Str. 1128.

A deceased attorney's book, charging for engrossing and registering a lease on a particular day, which was after its date, was received as evidence to shew the exact day of its execution. 15 East, 32.

*Executor.*—On a special *plene administravit*, and issue thereon, if assets be proved in the defendant's hands, he may give evidence of the payment of other debts with those assets, previous to the action brought.

*Extortion.*—In debt *qui tam* for extorting illegal fees, if the plaintiff set forth the judgment on which the writ was founded, he must also prove it. 2 Bl. 1101.

*Fee.*—How far possession of twenty years is evidence of a fee, and when it may be presumed. Cowp. 595.

*Foreign attachment.*—A condemnation in a foreign attachment, which appears to be subsequent to action in C. B., is no evidence. Barnes, 195.

*Foreign laws.*—Foreign laws must be proved as facts. Cowp. 174.

*Forgery.*—On an indictment for uttering a bank note, knowing it to be forged, proof that the prisoner had passed other forged notes of the same kind, is evidence that he knew the note in question to be forged. 1 N. R. 92.

*Gazette.*—The Gazette is evidence of any acts done by, or to, the king, in his regal character. 5 T. R. 436.

*Grant.*—A grant of one moiety is evidence that the grantor has the other moiety. 5 Taunt. 257.

*Inclosure.*—When an award under an inclosure act is ambiguous, a subsequent usage is admissible in explanation in relation to a road. 5 Taunt. 752.

*Incumbent.*—In an action by an incumbent for money had and received, against one who has taken the fees due to him in right of his living, is not necessary for the plaintiff to prove his having read the articles, &c., unless something appear to raise a presumption to the contrary. 2 Bl. 852.

*Indebitatus account.*—Under an *indebitatus* count, as many different contracts may be given in evidence as the plaintiff pleases. 2 Taunt. 46.

*Indorsement.*—The indorsement of a registration in Ireland on a deed executed there need not be proved. 1 T. R. 55.

*Inquisition.*—A commission of inquiry under the exchequer seal, and an inquisition taken thereon, is admissible but not conclusive evidence of lands having been part of a priory, though party to the suit was no party under this commission. 1 B. M. 146.

An inquisition *post mortem*, traversed, and trial whereon, though voidable, is evidence. Str. 308.

*Insolvent debtor.*—Duplicate of Insolvent debtor's discharge at sessions is evidence of his discharge. B. R. H. 145.

But not of any fact which is the foundation of their jurisdiction. B. R. H. 145—186.

If it recites that due notice was given, and the person who gave the notice is dead, it shall be evidence that thirty days notice was given. B. R. H. 186.

*Inspection of evidence.*—The court, in compelling the production of evidence, will impose such terms as may secure the party from penalties, to which the production might otherwise expose him. 2 Taunt. 115.

Application to enforce inspection of writings cannot be made before issue joined. 2 Blk. 877.

An adverse claimant having no interest in title deeds, has no right to inspect them. 3 T. R. 142.

A plaintiff

A plaintiff shall be obliged to produce his books relative to his dealings with defendant. Str. 1130.

If the deed on which plaintiff is suing consists of one part only, and is in defendant's possession, the court will compel him to permit the plaintiff to copy it. 1 Taunt. 386.; though he is seeking to discover a defect therein. 4 Taunt. 666.

Where it consists of two parts and plaintiff's one is lost, the court will not compel the production of the defendant's. 1 Mars. 610. 6 Taunt. 302.

Where the purpose is to have the writing stamped, either party to a suit is compellable to produce it. 4 Taunt. 157.

The plaintiff (the original party), is not compellable to produce the instrument on which he is using, for inspection, on suspicion that it is forged. 1 B. & P. 271.

The underwriter may have a rule for the inspection of all letters and papers directing the insurance. 2 T. R. 683.

The bankrupt is not entitled, previous to trial of an action disputing the bankruptcy, to inspect the proceedings in bankruptcy. He must subpoena the clerk of the commission. Loft. 80.

A creditor is entitled to inspect such proceedings, for purposes connected therewith. Loft. 80.

In trover by bankrupt assignees, the question being, whether the bankrupt sold the goods, the defendant had leave to inspect his sale books. Ibid.

A witness subpoenaed, *duces tecum*, should always have the writings ready for production. 9 East, 485.

Corporations, sued by each other, are entitled to inspect corporation books. 1 H. B. 206. So, one sued by one corporation, but who claims an exemption as freeman of another, is entitled to inspect the books of the latter. 1 T. R. 689. But a stranger, sued by a corporation for toll, has no right. 8 T. R. 590. The right, under 3 Geo. 3. c. 15. extends to all books, papers &c. containing entries of admissions of freemen. Cowp. 192.

A rule can only be granted where a cause is pending, and only then of a limited inspection; but the rule is of course. For an unlimited inspection, the course is by mandamus. 3 T. R. 579. 1 T. R. 689. 3 T. R. 303.

The obligation imposed upon the officer by 32 G. 3. c. 58., does not oblige him to grant inspection of books containing the orders for, and memoranda of, admissions and swearing in. 3 M. & S. 223.

If two are bailiffs, both are suable jointly, for refusing an inspection under the statute. Cowp. 192.

A mandamus lies to enforce inspection. 3 T. R. 141.

Every member of a corporation has a right to look into the books of the corporation for a matter that concerns himself, though the corporation is not a party in the dispute. Str. 1223.

If there be a rule nisi for information *quo warranto* the court will make rule for defendant to inspect charter and corporation books. B. R. H. 245.

An elector, officer in post-office, sued on 9 Ann. has a right to inspect corporation books where the freemens' names are enrolled and to take copies. Barnes, 235.

Plaintiff in trespass for distress for a fine set by the lieutenancy of London shall have leave to inspect their books and take copies, but the commissioners shall not attend with the books. B. R. H. 128.

A stranger affected by a bye-law has a right to inspect and take copies.

A lessee of the dean and chapter of Canterbury, defendant in ejectment at the suit of their trustee, shall not have liberty to inspect their books. Andr. 47.

The court will not make a rule to inspect the books of a company plaintiff, if it is not a public company, but defendant may give notice to have them produced at trial. B. R. H. 130.

The books of a company not a corporation nor trustees for a party shall not be inspected. Barnes, 36.

A com-

A company (as the East India company) shall not be obliged to produce books of letters in a cause where they are not concerned. Str. 646. Str. 717.

On an information against justices of a corporation, for taking money for granting ale-licences, prosecutor shall not have a rule to inspect the corporation books. Str. 1210.

On a rule to shew cause against information *quo warranto*, by what right defendant claims to hold a court leet in a borough, defendant shall not have a rule to inspect the corporation books, for it is a matter of private claim between the parties. Str. 1203.

Every one has a right to inspect the books of the sessions, for they are public books.

If a man sued and taken in execution in a court of conscience, brings trespass, &c. for it, he shall have liberty to inspect the books as far as relates to the suit against him. Str. 1242.

The right to inspect court rolls does not depend on the pendency of a suit. 10 East, 235. 7 T. R. 746. Inspection will be granted on a *prima facie* title. 10 East, *supra*. And to ascertain a right (to cut timber, e. gr.) which the lord disputes. 4 M. & S. 162.

But if lord of manor brings ejectment for lands, claiming them as copyhold, against defendant, who claims them as freehold, defendant shall not have rule to inspect the court rolls. 1 Wils. 104.

The tenant of a manor has a right to inspect the court-rolls; but he cannot have a rule for it without affidavit that he has applied for it, and been refused. Barnes, 236, *et seq.*

The court will order a justice of peace to give copy of information, and to produce the original (at trial for false imprisonment against informer), and constable to produce warrant. Barnes, 468.

In case of pleading letters patent not inrolled, on affidavit of the fact, the other side will be ordered a copy. 1 T. R. 149.

Post-office not obliged to produce books in suits where they are not party. Str. 1005.

Defendant, holder of stakes at a horse-race, shall give plaintiff copy of the racing articles. Barnes, 439.

Inspection of custom-house books refused in a suit concerning the amount of a branch of the revenue, between two not interested. 2 T. R. 610.

On an issue to try a modus, the plaintiff may be ordered to produce the books of former rectors, if they have been produced at the hearing. Bunb. 143.

Defendant, lord of a manor, who insists on a modus, not obliged to produce court rolls to shew what proportions of it are paid by the other defendants, tenants of the manor. Bunb. 269.

On an information by attorney-general against vice chancellor of Oxford, for misdemeanor in his office, the crown shall not inspect the archives and statutes of the university. 1 Wils. 239.

*Insurance*.—Bill of parcels from a merchant abroad, with his receipt to it proved, is evidence of property on an action on policy of insurance. Str. 1127.

*Joint tenancy*.—Payment of one entire rent to the clerk of seven trustees of a charity, coming to their title at different times, is *prima facie* evidence of a joint title. 12 East, 221.

*Journals*.—Proof of parliamentary journals may be by copy. Dougl. 593. Loft. 387. 428.

The journals of the house of lords are inadmissible even in criminal cases. B. R. H. 108.

*Judgment*.—A judgment directly upon the point, is as a plea, a bar between the same parties and their privies. 3 East, 346.

Where a particular question, such as whether an annuity is valid, has been directly

directly determined by a court of competent jurisdiction, it cannot be raised again. 6 T. R. 471.

If a court has jurisdiction to determine a matter of fact,—thus, the reasonableness of charges, their decision is final. 2 M. & S. 321.

The judgment of a judge *de facto* only, whether in a criminal or civil proceeding, cannot be impugned. 2 T. R. 87.

The sentence of a court having no original jurisdiction, is a nullity. 3 T. R. 267.

A judgment, though not entered up, cannot be proved by the judgment book, at least not without notice to produce the judgment paper. 2 N. R. 474.

In an action upon the judgment of a court in a foreign country, the sentence must be proved by proving the hand-writing of the judge of the court who ascribed it, and the authenticity of the seal affixed. 3 East, 221.

*Malicious prosecution.*—If two are indicted and acquitted, and copy of indictment granted to one only, the other may read it in evidence in action for malicious prosecution. Str. 1122.

*Marriage.*—An affidavit of the deceased allowed to be read in confirmation of other evidence to prove his marriage at the Fleet, though taken before a surrogate, when nothing before ecclesiastical court. Str. 35.

Sentence in the spiritual court in a cause of jactitation, is conclusive evidence against a marriage. Str. 960. 961. Vide Ambler, 756, acc., though there is an appeal entered, and though sentence was given after issue joined at common law. B. R. H. 11.

Sentence in spiritual court in a cause of contract is conclusive evidence on *non assumptis* pleaded in an action on contract of marriage. Str. 961. B. R. H. 18.

*Monastery.*—A book found in the herald's office, purporting to be an account of the possessions of a monastery, is not evidence of that fact. 2 Anst. 601.

*Motive.*—When an act has been done, to which it is necessary to ascribe a motive, what the person has said at the time is admissible, for the purpose of explaining the act. 5 T. R. 512.

*Nisi Prius Roll.*—The nisi prius roll is *prima facie* evidence of the time at which the action was commenced. 1 B. & P. 263.

*Office.*—If a defendant has held himself out as filling a particular character or situation, or has acknowledged the plaintiff to be invested with such, as by observance to him of a duty which the plaintiff could only have exacted, by holding the particular office, he must be presumed to be invested with it, for the purposes as well of penal as of other actions. 3 T. R. 632.

*Officer.*—Where a person is required to do an act, the not doing of which would make him guilty of a neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shewn. 3 East, 192. 2 Blk. 851. 3 Wils. 355. But if it be shewn that since the time when the act must be presumed to have been performed, a state of things has subsisted inconsistent with its performance, that is evidence to shew that it never took place. 2 M. & S. 558.

In the case of all peace officers, justices of peace, constables, &c. it is sufficient to prove that they acted in these characters, without producing their appointments. 4 T. R. 366.

In a *qui tam* action against a collector of taxes, it is not necessary to give in evidence his warrant. Proof that he has acted as collector is sufficient. Wightw. 67.

*Ouster.*—Judgment of ouster against bailiffs of a corporation, is good evidence against one making title, as elected under their bailiffship. Str. 1109.

*Ownership.*—Possession is presumptive proof of ownership. 4 East, 130.

*Parish Register.*—If there is a general register book of a parish, into which the entries of baptisms are made every three months from a day-book, into which they are made immediately, the first is the register and evidence, and the day-book not, though they differ, or any thing omitted in the register which appears

appears in the day-book ; as B. B. to signify base born. Per Probyn and Lee J. contra Page J. Str. 1073.

*Parliament.*—A member of parliament moving to be discharged on privilege, must produce in evidence the return of his writ of election. 2 Bl. 788.

*Parol evidence.*—Parol evidence shall not be admitted to annul or substantially vary a written agreement. 3 Wils. 275.

As where A. had two fields called Millcroft and Boreham, and B. came to an agreement in writing with A. to exchange with him a copper-mill, &c. in consideration that A. would permit him to take the grass and vesture of hay from off Boreham, which writing was signed by both parties and attested ; it was held that the witness should not be permitted to give evidence, that it was understood that A. should have the grass, &c. of Millcroft. Ibid.

So, parol evidence shall not be received to prove an additional rent payable by a tenant beyond that expressed in the written agreement for a lease.

Nor shall parol evidence be admitted to explain a writing, where the meaning is plain. Str. 794.

As if a man agree in writing to sell Blackacre for 1000*l.*, parol evidence shall not be admitted that he intended Whiteacre should also pass. 3 Wils. 276, 7.

So if a man devise in these words, "I give to my loving brother 1000*l.*, and in case of his death to his wife," if the husband survive the testator the legacy vests absolutely in him, and after his death his wife executrix shall not be permitted to give parol evidence that the testator had said in *extremis* that he meant only to give his brother the interest of 1000*l.*, and that the wife should have the principal in case she survived her husband.

But where the meaning of a written instrument is ambiguous, parol evidence may sometimes be admitted to explain it; as if there be two persons of the same name, or two pieces of land of the same name, parol evidence may be admitted to shew which of the two persons is meant in a will, or which of the two pieces of land in a deed. D. 3 Wils. 276.

Where terms of agreement are reduced to writing, the writing is the only efficient medium. 3 T. R. 406. 1 N. R. 270. 2 Blk. 1249.

An agreement by parol, though in terms professing to be a substitution for one under seal, in respect of the same subject matter, is nevertheless valid, if it is to take effect before the time limited in the other. 12 East, 578.

*Patron.*—If the patron's name in an institution is left blank in the bishop's register, parol evidence may be admitted to prove who was patron. R. on error from Ireland, 1 Wils. 215.

*Payment.*—Indorsement on a bond, of interest paid within 20 years, is evidence though under the hand of the obligee, if it was made before it could be thought necessary to encounter the presumption. Str. 826. 2 Ld. Raym. 1370.

But if the indorsment is after the presumption has taken place, it is not evidence. Str. 827.

*Pedigree.*—A visitation made by the heralds, entered in their books, and kept in their office, evidence of a pedigree. Str. 162.

So the minute book of a former visitation signed by the heads of the several families and found in a private library. Str. 162.

The declarations of a deceased parent, though they are evidence of the time of a child's birth, are not of the place. 8 East, 539.

A will by an ancestor is evidence on a question of pedigree (though it be found cancelled, and not known to have been proved or acted on) if it appears to be treated as a paper relating to the family. 11 East. 504.

*Presentation.*—The copy of the bishop's institution book is not admissible to prove a presentation. 3 Wils. 366.

*Printed and written stipulations.*—Where printed and written stipulations are at variance, the written shall be preferred. 1 Taynt. 391.

*Privy.*

**Privy.**—A survey taken by one under whom the party who produces it claims, cannot be given in evidence, the other party not being privy. Str. 95.

**Process.**—Evidence of the day when a writ was actually sued out, may be admitted to obviate the fictitious relation of a declaration to the first day of the term, and thereby shew that the cause of action arose subsequent to bringing the suit. 3 Burr. 1241. 1 Blk. 312. 3 Wils. 461. 2 Blk. 924. For in suits by bill, the memorandum is only presumptive proof of the time the suit was commenced; the real time, therefore, may be shewn by the defendant. 4 East, 75.

If a sheriff's officer on a *fi. fa.* take the goods of a stranger, to an action by the stranger, the officer must not only produce the *fi. fa.* in evidence, but also a copy of the judgment on which the *fi. fa.* was issued. 1 Ld. Raym. 733. 2 Bl. 701. Vide Doug. 41. Escape, (B 1.)

**Promissory note.**—If an original note is lost, and a copy offered in evidence, the court must first be satisfied of the genuineness of the original. 1 Atk. 446. (a.)

**Quantum meruit.**—On a *quantum meruit* for work and labour, the defendant may give evidence that the work was not done well. 3 Smith, 486. 7 East, 479.

**Receiver's books.**—Receiver's books may be determined to be such by inspection. 10 East, 206.; but evidence that the receivers of an ecclesiastical corporation have, for the last sixty years, kept their books in the same form as certain antient books were kept, is inadmissible to prove that these also were receiver's books. Ibid.

**Recitals.**—The recital of a fact in the counterpart of an indenture, is evidence against the party by whom the deed is executed. 5 T. R. 465.

**Record.**—An officer may be examined as to the condition, but not as to the matter of a record. Str. 210.

**Renunciation of a right.**—Where a treaty is proved between two, for the renunciation by the one of a right of action against the other, as the basis of an agreement between them, and it is also proved that the latter has renounced all knowledge of such an agreement, the presumptions are, that none was concluded, and so the former may sue on his original right. 3 B. & P. 630.

**Reputation.**—In questions concerning public rights, common reputation is admitted to be evidence. 14 East, 329.

Where general opinion is evidence of a general right, the tradition of a particular fact, said to have been done in the exercise of that right, will not be evidence. 5 T. R. 123.

Reputation is not evidence of private rights; thus, a grant of the privilege of cutting wood cannot be presumed from a reputation of the party's right to that privilege; nor where it is claimed by the tenants of a manor against their lord. 2 M. & S. 494.

So, a question as to the boundary between two estates. 14 East, 331. 327.

Evidence of there being a known distinction in the manor between old and new land,—that, in fact, the plaintiff's freehold tenement lay within the boundary of the new land,—of reputation, and of acts of taking coal under the lands of other freeholders within the same boundary,—is inadmissible to prove that the lord was entitled to the coals under this freehold. 1 M. & S. 77.

In trespass for cutting down the plaintiff's trees, the defendant pleaded his soil and freehold in the close upon which the trees were growing, &c.; the plaintiff replied, that the trees were his trees, and freehold. It appeared, on the trial, that the trees in question grew in a woody belt of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant. Evidence was admitted of several acts of ownership in different parts of the belt, by those under whom the plaintiff claimed, which had been acquiesced in by the owners of the adjoining lands. 14 East, 332.

Seal.

*Seal.*—The fact that a seal annexed to corporate proceedings, as such, must be proved by one acquainted with the impression; but not that of its annexation. 8 T. R. 303.

The proof of the seal of a foreign court must be by one acquainted with its impression. 3 East, 221.

*Stamps.*—A bond in the condition whereof a mortgage demise is contained, need not have two stamps. Barnes, 463.

A deed is good evidence if stamped when produced at the trial, though not stamped when executed or when first produced. Str. 624.

But annexing another piece of parchment with a stamp upon it will not do; this stamp must be on the parchment itself (and to obtain this the penalty must be paid). Str. 716. Ld. Raym. 1445. Vide in tit. Stamp.

*Statute.*—The printed statutes examined with the parliament roll are evidence. Str. 446.

*Terrier.*—A terrier is not evidence, unless it come from the registry of the diocese, or a copy from the parish registry, if the original is lost. 2 Anst. 387.

*Trespass.*—No new matter foreign to the issue joined is admissible in evidence; therefore if to an action of trespass and false imprisonment, the defendant plead matter which amounts to a justification, and the plaintiff reply generally, *de injuria sua propria absque tali causa*, he cannot give in evidence any thing in avoidance of the justification, as a refusal to admit the plaintiff to bail where the offence for which he was committed was bailable. 2 Bl. 1165.

*Verdict.*—On questions of public right a verdict is evidence between third persons. 1 East, 355.

A special verdict, to which defendant was no party, given in a cause in which the premises in question were recovered on a general verdict, and the special verdict related to other premises, shall not be allowed as evidence even of a pedigree. Str. 1151.

Whether the coroner's inquest might be read as evidence against the executrix, to whose advantage it was *dubitatur*. Parker C. J. and Powys J. pro Eyre J. and Pratt J. cont. Str. 68.

The *postea* is no evidence of the verdict, without a copy of the final judgment; for judgment might have been arrested or a new trial granted. Str. 162.

The *nisi prius* record and the *postea* are evidence to prove that a verdict was given. Willies, 367. Barnes, 449. S. C.

*Vice consul.*—The certificate of a British vice consul is not evidence of the amount of a sale by him, though authorised by the foreign law. 3 Taunt. 162.

*Writings.*—In general, where an instrument produced by the other side purports to belong to him, it is admissible for him, without proof of execution, or its custody, provided it is of sufficient age, and in other respects evidence. 5 T. R. 259.

When produced by a party thereto on notice, and who claims an estate under it, is evidence for his adversary, without proof of execution, that he took that specific estate. 3 Taunt. 60.

A writing thirty years old is admissible without further proof. 2 T. R. 466. 4 T. R. 709.; unless a bond, when payment of interest, or other mark of authenticity, must appear. 1 Blk. 532.

A grant to an abbey, contained in a MS. entitled "*secretum abbatis*," in the Bodleian library at Oxford, rejected, the custody not being the proper one. 3 Taunt. 91.

An old grant to a priory, brought from the Cottonian MSS. in the British museum, was rejected as evidence, as it was not shewn that the possession of the grant was connected with any persons interested in the estate. 3 Taunt. 91.

TESTMOIGNE—WITNESS.

(A) Witness ; who shall not be.

(A 1.) *Non Compos.*

Every witness must be credible.

And therefore, a man of *Non-sane* memory shall not be allowed as a witness. Co. L. 6. b.

As, an idiot.

A lunatic during his lunacy.

So one within age of discretion. Co. L. 6. b.

As, an infant, who does not know the nature of an oath.

So, in an *etate probanda*, a witness shall not be allowed under the age of 42 years. Bro. Testm. 30.

But a lunatic may be a witness, *in lucidis intervallis*.

(A 2.) Infidel.

So generally an infidel shall not be a witness. Co. L. 6. b. Vide cont. 2 Stra. 1140.

(A 3.) Person convicted of treason or felony.

So a person attainted, or convicted, of treason, or felony, shall not be a witness. Co. L. 6. b.

Or of piracy. R. 2 Rol. 686. l. 27.

Though it be to excuse a man accused falsely by him and by the instigation of another. R. 2 Rol. 686. l. 30.

But a person pardoned for his treason or felony will be a good witness. Per 3 J. 2 cont. Ray. 369. Dub. Ray. 380. R. cont. 2 Bul. 154. R. acc. for the pardon takes away *penam et reatum*. 1 Vent. 349.

So, if he be burnt in the hand for felony ; for that is *quasi* a pardon by statute. R. Ray. 369. R. Ray. 380. R. Keil. 97. Vide post, (B. 4.)

So an accomplice in the same crime before conviction. R. Keil. 17.

Though he has a promise of pardon, and the promise be not made for his evidence. Keil. 18.

(A 4.) Or any infamous man.

So a man infamous in any respect shall not be a witness ; as, if a champion in a writ of right be recreant. Co. L. 6. b.

If a man be attainted for a false verdict. Co. L. 6. a.

By the st. 5 El. 9. if convicted for perjury or subornation, till the judgment reversed.

So, if convicted of perjury at the common law. Co. L. 6. b.

So, if convicted of forgery upon the st. 5 El. 14. or otherwise. Co. L. 6. b. 5 Mod. 74.

Or, of a conspiracy at the suit of the King. Co. L. 6. b.

Convict in *præsumere*. Co. L. 6. b.

So, if he had an infamous judgment, and upon that stood in the pillory, or tumbrel. Co. L. 6. b. 5 Mod. 74. Sal. 461.

Or be stigmatized, or lose his ears. Co. L. 6. b.

Or be whipt for petit larceny. Per St. John at Suff. Ass. 1657. Altered by stat. 31 G. 3. c. 35.

So,

So, if he have judgment of the pillory, though he did not stand there. R. 3 Lev. 426. Sal. 689.

Or be convicted of barrettry, though only fined; for the crime makes the infamy. R. Sal. 690.

So, though pardoned after a conviction of perjury, he shall not be a witness. 1 Vent. 349. Sal. 689.

So, a pardon of any crime, after examination, does not make his testimony good. R. 3 Lev. 426.

So an affidavit of such a person in any cause shall not be admitted regularly.

But a conviction of felony, perjury, &c. does not take away his testimony, unless the record be produced.

So a record, by which he is found guilty by verdict, is not sufficient, if judgment be not entered. R. 1 Sid. 51.

So, if he stood in the pillory, where the judgment was not infamous, it does not take away his testimony: as, for a libel, or words in slander of the government. R. 3 Lev. 426. Semb. 5 Mod. 75.

So a man convicted of forgery upon the st. 1 H. 5. 3. shall be a witness. Co. L. 6. b.

Or of barrettry. Per Glin and Newd. M. 1957. B. R. *sed* Main. cont. *fortiter*. R. cont. Sal. 690.

So a man outlawed in a personal action. Co. L. 6. b.

So the pardon of an offence enables him to be a witness, except in perjury, where the disability is part of the judgment: as, if the felony, &c. of which he is convicted, be pardoned. Per 3 J. 2 cont. Ray. 369. Cont. 2 Bul. 154. Dub. Ray. 380. R. acc. 1 Vent. 849. R. Sal. 689.

So, if burnt in the hand for felony, for it is *quasi* a statute pardon. R. Ray, 369, 380. Sti. 388. per Trev. 7 An.

And proof of the record whereby clergy is granted is sufficient, without proving that he was burnt. Per Trev. 7 An.

So a pardon of perjury by act of parliament enables him. Per Holt, Sal. 689.

So, if there be not a legal objection against a witness, other scandal to his credit shall not be allowed: as, that he is a whore-master, drunkard, &c. Mar. pl. 136.

So an affidavit of one convicted of perjury, &c. shall be allowed to prove a mal-practice against him. Sal. 461.

Vide more concerning Witnesses in Chancery, (P. 7.)—Evidence, (A. 3.) — Fait, (B. 4.) — Parliament, (E. 11. — L. 25. — Trial, (B. 5.)

### Addenda.

*Agent.*—In some cases even an interested person is a competent witness from necessity; as, where an agent of one person pays money to another, he shall be admitted to prove the payment, though he thereby discharges himself against his principal. 3 T. R. 29. Vide Str. 647.

So in an action brought against a master for his carman's driving his cart negligently *per quod*, &c. the carman may be a witness for his master. 2 Str. 1083.

Whether a servant can be a witness for his master, who has brought trespass for beating the servant *per quod servitum amisit* quære? Str. 414. 595. 944.

A factor who sells for the plaintiff, and he is to have poundage, may be admitted to prove the contract. 3 Wils. 40.

A per-

A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated sum, is a competent witness to prove the contract between the buyer and seller. 2 H. Bl. 590.

If A. have received money from B. to pay to C. and the question be whether A. were the agent of C. for that purpose, A. may be called as a witness to prove the agency. 7 T. R. 480.

A servant or clerk who has embezzled money or notes of his master's, is an admissible witness (provided he has a release) against the person who received such money or notes from him, in an action for money had and received, brought by his master to recover the amount. Cowp. 199.

*Attendance.*—If one of the parties wish to have the testimony of witnesses whom he cannot compel to attend, the court may put off the trial from time to time till the other party consent that depositions may be taken where they are. Cowp. 174.

But leave cannot be had to examine an ancient witness before a judge without consent. Barnes, 447.

A witness who wilfully absents himself may be attached for the contempt, or an action on the case will be against him. Doug. 561.

By st. 5 El. c. 9. s. 12. if any person, on whom any process out of any of the courts of record within this realm or Wales, shall be served to testify concerning any cause or matter depending in any of the said courts, and having tendered unto him, according to his countenance or calling, such reasonable sums of money as, having regard to the distance of the places, are reasonable to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful or reasonable let or impediment to the contrary, then the party making default shall lose and forfeit for every such offence 10*l.*; and yield such further recompence to the party grieved as by the discretion of the judge of the court, out of which the said process shall be awarded, &c. to be recovered by action of debt, &c.

This further recompence must be assessed by the court out of which the process issued, not by the jury or judge at nisi prius. Doug. 556.

*Attesting witness.*—A bond having been executed by A. and attested by one witness, was carried into an adjoining room and shewn to B., who was desired to attest it also, which he accordingly did in the presence of A., and it was holden that he was a good witness to prove the execution. Bos. & Pull. 217.

The rule that execution of an attested instrument must be proved by the subscribing witness, if he can be produced and examined, admits no exceptions. 4 M. & S. 350.

Though when an instrument is produced by the suitor, pursuant to notice, and he is a party thereto, and claims a beneficial estate under it, the other side need not call the subscribing witness. 8 East, 548. 3 Taunt. 62.

The acknowledgment of the adverse party to an attested instrument, is insufficient proof. Dougl. 216.; though made in answer in chancery. 4 East, 53.

And the deposition of the attesting witness on interrogatories, after acknowledgment by obligor, is inadmissible, if taken (here on the ground of sickness) at the instance of the obligee only. 4 Taunt. 46.

In an action on a bond, or to prove a petitioning creditor's debt which arises by bond, proof of the acknowledgment of the obligor, does not supersede the necessity of calling the subscribing witness. Dougl. 216.

Yet where the witness refuses to testify, the execution may be proved by others, or his testimony disapproved. 4 M. & S. 353. 2 Mars. 527. 7 Taunt. 251.

Where he is unable to attend from sickness, still his attendance cannot be dispensed with. 4 Taunt. 46.

But where he is abroad, or out of the jurisdiction, proof of his hand-writing is sufficient. 2 East, 250. 1 B. & P. 361. 7 T. R. 265. Dougl. 93. Id. 266.

So, where he cannot be found, secondary evidence will do; but semble, where grounds are shown for suspecting that he is purposely kept out of the way, proof of stricter search is requisite. 1 Taunt. 364.

If attesting witness has lived abroad, strict proof of his death is necessary; if he has lived in England, slight proof is sufficient. 2 Atk. 48.

So, where he was and still is interested, secondary evidence will do. 5 T. R. 371.

In trover, by the assignees of a bankrupt to recover goods taken by the defendant under a fraudulent bill of sale, given by the bankrupt to the defendant (and which was an act of bankruptcy), the defendant's examination before the commissioners, in which he admitted the execution of the deed, is sufficient evidence to prove the execution, and supersedes the necessity of calling the subscribing witness. 5 T. R. 366.

In the case of a warrant of attorney to confess judgment, to dispense with the deposition of the attesting witnesses, the nature of the search, where he had been last seen or known to reside, and when he was last heard of, must be stated. 4 Taunt. 132.

The hand-writing of the witness is evidence of the sealing, delivery, and party's hand-writing. 2 East, 250. 1 B. & P. 360. 7 T. R. 266.

In the case of two attesting witnesses, and one dead, the other absent, proof of either's hand-writing will do. 1 B. & P. 360.

Secondary evidence is admissible, on proof of inquiry after witness at the residence of the obligor and obligee, without any intelligence of such a person being obtained. 2 East, 183.

So, if on inquiry at the admiralty, it appears that he is serving in the navy, but where cannot be ascertained. 2 Taunt. 223.

So, notwithstanding the vessel in which he sailed put back just before trial. 1 Taunt. 461.

If a subscribing witness is become infamous, on producing his conviction his hand may be proved, as if he was dead. Str. 883.

In debt on bond by the administrator *de bonis non* of the obligee, and who was the only surviving witness, bond proof of the hand-writing, and several letters from the obligor mentioning the bond, allowed good. Str. 34.

*Attorney.*—An attorney present at the swearing of an answer in chancery is not obliged to be a witness on an indictment for perjury in the answer. 2 Str. 1122.

*Bail.*—If one of the bail be a subscribing witness, he shall be obliged to give evidence. 1 Str. 406.

And if he be a material witness, the court will permit his name to be struck out of the bail-piece, and another entered in his place. B. R. H. 133.

But the court will not give leave to strike out the name of a defendant in ejectment, on affidavits that he is not interested in the premises, and is a material witness for the other defendants, especially if the jury process and the subpoenas have issued. Id. 162.

*Bankrupt.*—A bankrupt who has obtained his certificate is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission. 2 H. Bl. 279.

The creditor of a bankrupt who has released his debt to the assignees, though not to the bankrupt, may be a witness to prove the bankruptcy. B. R. H. 267.

The creditor of a bankrupt cannot be admitted to prove the bankrupt a gamester; because by gaming the bankrupt's certificate is gone, and his allowance forfeited, and consequently the creditors dividends are increased. Str. 507.

*Baron and Feme.*—Husbands and wives cannot in any case be witnesses either for or against each other. 4 T. R. 678.

Husband and wife shall not be called to give evidence for or against each other. B. R. H. 264. Vide 2 T. R. 263.

Therefore the wife's owning the receipt of money due to her husband for wages earned by her, was considered as no evidence in an action brought by the husband. 2 Str. 1094.

They shall not be admitted in any case to give evidence even tending to criminate each other. Therefore in a case of settlement, where a marriage in fact had been proved between two paupers, the first wife of the husband was not admitted to prove a former marriage with him, because such evidence would have tended to a prosecution against him for bigamy. 2 T. R. 263.

But in an action between third persons, a wife may be admitted to give evidence which throws the debt upon her husband. Thus, in an action against the daughter's husband for the daughter's wedding clothes, her mother was admitted to give evidence, which shewed that they were delivered on the credit of the mother's husband. 1 Str. 504.

So in an indictment against the husband for an assault on the wife, herself has been admitted as a witness. 1 Str. 633.

So where the contract is made with the wife, in some cases the wife's declaration may be given in evidence in an action against the husband. Thus the wife's declaration that she had agreed to pay four shillings a week for nursing a child was allowed to be given in evidence to charge her husband; the chief justice observing, that matters of that kind were properly under the direction of the wife. 1 Str. 527.

In an action by husband and wife in right of the wife as executrix, no declarations of the wife can be given in evidence by the defendant. B. R. E. 36 Geo. 3. 6 T. R. 680.

In an action for enticing away the plaintiff's wife, the declarations of the wife are inadmissible. C. P. T. 18 & 19 Geo. 3. Willes, 577.

The wife of one defendant cannot be a witness for the other in an indictment against two. 2 Str. 1095.

*Bastard.*—The reputed mother is a competent witness to prove the illegitimacy of her children. 6 T. R. 330.

A mother may be a witness to prove her marriage when her son's legitimacy is in question. B. R. H. 277.

So on a question of settlement, husband and wife may prove their own marriage. 2 T. R. 263.

*Bill of exchange.*—In an action by the indorsee of a bill of exchange against the acceptor, the defendant cannot call the indorser as a witness to prove that the plaintiff had no right to recover upon the bill, having received it from the indorser merely in trust to obtain payment of it from the acceptor on account of the indorser himself. 5 T. R. 578.

In an action by an indorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness to prove that the bill was void in its creation. B. R. E. 38 Geo. 3. 7 T. R. 601.

An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer in an action against him by the indorsee, to prove that he had satisfied the note, being either liable to the plaintiff on the note if the action were defeated, or to the defendant in money had and received, if the action succeeded. 2 East, 458.

And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such nonpayment, makes no difference. Ibid.

*Bribery.*—A person who gives a bribe to another to vote at an election for members of parliament, is a competent witness to prove the bribery in an action for the penalty under the statute. Willes, 422.

Whether it be an objection to the competency of a witness for the plaintiff in an action for bribery, that a similar action was pending against the witness, and an acknowledgement by him that if the defendant were convicted, he should, if necessary, avail himself of his having been the first discoverer to the plaintiff. 3 East, 451.

*Corporation.*—A father, who has gained his freedom in a borough by servitude, may be admitted to prove a custom by which his eldest son is entitled to his freedom. 1 Wils. 332.

And the member of a corporation who has acted under the right claimed may be a witness to prove the usage. 2 Str. 1069.

Where two qualifications are necessary to be elected, he who has only one of them, may be a witness to prove the qualifications. 2 Ld. Raym. 1353. 1 Str. 583.

A corporation is competent to produce and depose concerning the custody of corporation muniments, when depositary. 2 M & S. 337. 338.

*Credible.*—Competency is implied in the term witness, and therefore whenever in acts of parliament which direct convictions on the oaths of witnesses, the epithet credible is added, it is intended only from abundant caution to declare that though competent witnesses swear positively, their credibility is to be weighed, and if the magistrate think the evidence not credible, he ought not to convict. 1 Bur. 414.

*Examination.*—Formerly the rule was to object to the witness before he was sworn in chief; and the objection must still be made at the trial. 1 T. R. 717.; and it is too late to object to him after he has been examined and cross-examined. 4 Burr. 2251. Vide B. R. H. 358.

And an objection to the competency of witnesses discovered after trial, is not a sufficient ground of itself for applying for a new trial; but it may have some weight with the court where the party applying appears to have merits. 1 T. R. 717.

If a witness be examined by the party producing him to one point only, the adverse party may examine him to that, but not use him to prove a different fact. 2 Atk. 44. *sed qu.* as to the latter part.

The party who excepts to a witness may call him afterwards. 1 Str. 480.

A person offering himself for bail may be asked whether he has not been in the pillory for perjury. T. R. 440.

*Indictment.*—On an indictment for destroying a note, the proprietor may be a witness. 1 Str. 595.

So, an indictment for forging a letter of attorney, by which the prisoner transferred the stock of A., A. was admitted as a witness. 2 Str. 728. Vide *Ib.* 1220.

So, the prosecutor of an indictment, though he had laid a wager that he should convict the defendant. 1 Str. 652.

If two be indicted, and one submit and pay a fine, he may be examined as a witness for the other. 1 Str. 633.

So, if one indicted plead misnomer, and for want of a replication be discharged, he may be a witness for the other defendants. B. R. H. 303.

But on an indictment for perjury, in denying in an answer an agreement not to put a note in suit, the giver of the note, defendant at law, and plaintiff in equity, has been refused to be admitted as a witness. 2 Str. 1043. B. R. H. 265.

The defendants in ejectment, against whom a verdict has been given, cannot be witnesses for the prosecutor on an indictment for perjury committed on that trial. 2 Str. 1104.

*Infamy.*—The affidavit of one convicted of forgery cannot be read to support a complaint, but it may defend himself against a complaint. Str. 1148.

*Infant.*—Infant under ten very seldom; and under nine never admitted to be a witness, either in capital cases or less offences. Str. 700.

*Infidel.*—An infidel pagan idolater may be a witness, and his deposition, sworn according to the custom of the country where he lives, read in evidence. 1 Wils. 84. 1 Atk. 19. Willes, 538.

A mahometan may be a witness, and sworn on the Koran. At council, present two Chief Justices. Str. 1104. Leach's Cro. Cas. 58.

*Interest.*—The general objection to the competency of a witness arises from

an interest which he may have in the event of the cause; for in general a person is a competent witness unless he be so interested, and unless the verdict can be given in evidence by him in another suit. 3 T. R. 27. 308.

Therefore in covenant for rent upon a lease by A. to B., if the point be in issue, whether C., whose title both admit, demised first to A. or another person, C. is a competent witness to prove the point in issue, for the verdict cannot be given in evidence in any action which may afterwards be brought by or against him. 3 T. R. 27. 308.

And to be a witness, it is not necessary that he should be absolutely indifferent; for in such a case his credibility may be left to the jury. B. R. H. 358.

And the bare possibility of a witness being liable to an action in a certain event, is no objection to his competency. 1 T. R. 163.

And in order to render a witness incompetent, it is necessary to shew that he must derive a certain benefit from the determination of the cause one way or another. 1 T. R. 163.

Therefore a co-obligor in a bond to the ordinary, under 22 & 23 Car. 2. c. 10., is a competent witness to prove a tender by the administratrix. 1 T. R. 163.

So, a creditor of the administratrix is a good witness to the same purpose. 1 T. R. 163.

But a person who apprehends himself to be interested, cannot be a witness, though in strictness he be not interested. 1 Str. 129.

On an information for importing teas contrary to the act of navigation, the master of the ship was produced by the defendant, but was not allowed, because the ship was forfeited by the act. Bunb. 140. Vide etiam, Bunb. 203.

It was holden, that where a corporation was lord of a manor, and had approved and leased a part of a common, that a freeman was not a competent witness to prove that a sufficiency of common was left for the commoners, because the rent must have been reserved for the use of the corporation. 5 T. R. 174.

The subscribing witness to a bond, if he is interested therein at the time of the attestation and the trial, cannot be examined as a witness to prove the execution, nor is proof of his hand-writing sufficient for that purpose. 5 T. R. 371.

If witness be disinterested at the time of a disposition taken, that deposition may afterwards be read, though he afterwards become interested. 1 P. Will. 289. Vide 1 Str. 101.

But on a trial at nisi prius, it is said such a person cannot be examined as a witness. 1 Str. 101.

But in a later case it has been held, that where the person was not interested at the time when the plaintiff or defendant first had an interest in his testimony, his evidence may be received, though he afterwards became interested; thus, in an action against underwriters, the broker was admitted to prove circumstances which tended to discharge them, he having been disinterested at the time when they signed the policy; but having afterwards become interested by signing the same policy himself as an underwriter. 3 T. R. 27.

A person who has an interest may become a competent witness by releasing his interest, or by having a demand against him released; therefore if one underwriter has engaged to contribute to the costs of another, the defendant in an action on the same policy and has joined as plaintiff in a bill in equity for a discovery; he may be made a competent witness, by the defendant's releasing him from any contribution to the costs in law or in equity, and by an offer by himself and the defendant, to pay the costs in equity, and to dismiss the bill as to them. 3 T. R. 27.

Where two persons joined in an assignment of a ship, one of them was permitted to prove that at the time of the assignment he had no interest in the vessel. 1 T. R. 301.

By 46 Geo. 3. c. 37. liability to a civil suit from answering a question is no defence.

*Landlord and tenant.*—A tenant in possession is not a good witness to prove his landlord's possession, or to support his title, because it is to uphold his own possession. Cowp. 621.

Where A. rented a tenement of C. who covenanted to reimburse him all the poor-rates, and A. underlet to B., A. was held to be a competent witness to prove such letting to B. upon an appeal. 1 T. R. 262.

If two persons are contending for the possession who are to pay rent in different rights, the landlord cannot be admitted to prove the demise in the ejectment.

*Parishioner.*—An inhabitant of a parish who is not rated, is a competent witness on an appeal between that parish and another. Ibid.

And such parishioner is a competent witness, if the omission of his name in the rate was for the express purpose of obtaining his testimony. 2 East, 559.

On an appeal against a poor-rate, because certain persons were omitted to be rated, a parishioner who is liable to be rated, but in fact not rated, is a competent witness to prove the rateability of the appellants. 5 T. R. 664.

On an appeal between the parishes of A. and B., the former may call an inhabitant of the latter who is not rated to the poor, and compel him to be examined as a witness. 6 T. R. 157.

By stat. 27 Geo. 3. c. 29. parishioners are made competent witnesses in prosecutions where the penalty is given to the parish, unless it exceed 20l. 6 T. R. 177.

Persons appointed by an act of parliament governors and directors of the poor of a certain parish, and made liable on appeal against a rate made by them to the payment of costs, in case the sessions should award any to the appellants, cannot be witnesses on such appeal, though only trustees and entitled to be reimbursed such costs out of the parochial fund, for they are parties to the cause, and liable in the first instance to the costs. 3 East, 7.

*Party.*—A party who supports a cause cannot be a witness. B. R. H. 202.

The guardian of an infant on record, cannot be a witness for the infant. 1 Str. 506.

Nor the *prochein amy*. 2 Str. 1026.

Whether the wife of *prochein amy* can? Qu. 1 Str. 106.

If a surviving witness to a bond be made executor of the obligee in an action brought by him on the bond, evidence shall be admitted to prove the plaintiff's hand as if he were dead. 1 P. Wms. 289.

A man is not a competent witness to impeach a security which he has given, though he be not interested in the event of the suit; therefore where a bond was given in consideration of delivering up a promissory note, an indorser was not admitted to prove that the consideration of the note was usurious. 1 T. R. 296.

Where three obligors, and actions brought against one only, the other obligor allowed to be a witness to prove execution of bond by defendant. Str. 35.

*Quaker.*—By st. 7 & 8 W. 3. c. 34., made perpetual by 1 G. 1. st. 2. c. 6., and amended by 8 G. 1. c. 6. and 22 G. 2. c. 30. 46., Quakers instead of an oath, shall be permitted in courts of justice to make their solemn affirmation, which shall be of the same force in law as an oath, and subject them to the same penalties in case of perjury.

But they are not to be admitted as witnesses in criminal cases; and by 32 G. 2. c. 46. the affirmation of Quakers shall be received in all cases where an oath is required by any act of parliament, with the like penalty in case of false affirming, and with the like exception of criminal cases.

On this exception it has been held, that the affirmation of a Quaker cannot be admitted on an appeal for murder. 2 Str. 854. cited Cowp. 392.

Nor

Nor on a motion to ground an information for a misdemeanour. 2 Str. 872. 1 Barnard K.B. 346.

Nor to ground a motion for an attachment, unless by consent; and if by inadvertency a rule to answer the matters in an affidavit be made when the affidavit was only by affirmation, it will be discharged. Andr. 200. 2 Str. 946.

Neither shall the affirmation of a Quaker be admitted to exculpate a third person, against whom an application has been made for a criminal information. 2 Burr. 1117.

But to exculpate himself it may be admitted. 2 Burr. 1117.

And a Quaker's affirmation has been held sufficient to prove the service of a rule to shew cause why an appointment of overseers should not be quashed, for this is not a criminal prosecution. 2 Str. 1219. cited Cowp. 385.

So the solemn affirmation of a Quaker (together with a tender of 20l. pursuant to st. 26 G. 2. c. 18.) entitles him to admission into the Turkey Company, without taking the oath prescribed by that act. 2 Burr. 999—1005.

So the affirmation of a Quaker shall be admitted in a *qui tam* action. Cowp. 382—395., where this subject is discussed at full length.

*Seduction.*—In action by a father for deflowering his daughter *per quod servitium amisit*, the daughter may be a witness, but she must not give in evidence a promise of marriage. 2 Str. 1054. 3 Wils. 18.

*Sheriff and Bailiff.*—In an action against the sheriff for a false return, the bailiff who had the warrant was not allowed to prove an attempt to arrest. Str. 650. 2 Ld. Raym. 1411.

*Trespass.*—And in order to take off the testimony of a person joined in the *simul cum*, evidence must be given of his being some way concerned in the fact, that process be issued against him, and that endeavours have been used to take him. 11 B. R. H. 123. 264.

*Trustee.*—A grantee, when he appears to be a bare trustee, is a good witness to prove the execution of a deed to himself. 1 P. Wms. 290.

*Usury.*—The borrower of money is a competent witness to prove the usurious contract and the repayment of the money. 4 Burr. 2251. 2256. B. R. M. 37 G. 3. 7 T. R. 60. Cont. Str. 633.

But in a *qui tam* action on the statute of usury against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, unless he has obtained his certificate or repaid the money. 2 T. R. 496.

*Vendor and Purchaser.*—The vendor, without covenant for good title or warranty, may be a witness to prove the title of the vendee. Str. 444.

## [THAMES.]

[The water bailiff's right to seize engines or fish in one's own fishery, as prohibited by st. 1 Eliz. c. 17.]

[Must be founded on a previous presentment or conviction. 3 Burr. 1768. 1 Blk. 569.]

[The rowing and towing up spars by a servant for his master, for which he receives nothing extra, is not a rowing for hire and gain, within 2 G. 2. c. 26. s. 4. 2 M. & S. 145. 147. (n.)]

## [THEATRE.]

[A contract by A. with B. to dance, 1. "At an unlicensed theatre, by name;—2. Or at such other place as B. should appoint," is void as to the first part; and as to the second, obliges B. to request, not A. to tender, his services. 5 T. R. 242.]

[Dancing is an entertainment within st. 10 G. 2. c. 28. 5 T. R. 242. Tumbling is not. 6 T. R. 286.]

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## THREATS.

Vide BATTERY, (D.)—PLEADER, (2 W. 20.)

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## TIME.

Vide TEMPS.

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## TITHES.

Vide DISMES.

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## TITLE.

Vide ASSISE, (B. 17, 20.)—MAINTENANCE, (A. 5.)—PLEADER, (C. 84. 86. 40, 41, 42. 49.—E. 21.—F. 13.—3 M. 40.—3 O. 2.)—PROHIBITION, (F. 2.)—REMITTER, (C. 1.)

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## TITLE OF ENTRY.

Vide DISCENT, (D 10.)

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## TOLL.

(A) The several kinds of toll. p. 457.

(B) Toll-turn. p. 457.

(C) Toll-thorough. p. 458.

(D) Toll.

(D a.) Toll-traverse. p. 459.

[(D b.) Toll on sales by sample. p. 459.]

(E) Who may demand toll. p. 459.

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(G) Who shall be quit of toll.

(G 1.) By prescription. p. 460.

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(H) Remedy for freedom from toll.

(H 1.) By writ *de essendo quiet. de thelonio*. p. 461.

(H 2.) By actions. p. 462.

### (A) The several kinds of toll.

Toll, *tolnetum*, *telonium*, or *thelonium*, are all of the same import, and signify a sum of money paid by the buyer for goods or merchandizes exported or imported, or sold within the realm. 2 Inst. 58.

As to toll in a market, picage, and stallage. Vide in Market, (F 1, &c.)

So the king, or a subject, owner of a port, may prescribe for toll for merchandize there imported, without any consideration; for the owner is indictable, if he does not repair the port. Semb. Lut. 1523. Semb. 1 Mod. 104.

So for toll for murage, for it will be for the benefit of the people that the walls of a town for defence of the country are repaired. Cro. El. 711.

Vide Prerogative, (D 48.)

### (B) Toll-turn.

So, toll may be payable for cattle or goods in their return from a fair or market. Bl. Nom. verb. Toll. 1 Sid. 454. Cro. El. 711.

### (C) Toll-thorough.

Toll-thorough is a sum demanded for a passage through an highway. Bl. Nom. verb. Toll. 22 Ass. pl. 58.

Or,

Or, for a passage over a ferry, bridge, &c. Bl. Nom. verb. Toll.

Or, for goods which pass by such a port in the river. 1 Mod. 47.  
1 Sid. 454.

And, it may be demanded in consideration of the repair of the pavement in a high street. Jon. 162. [Vide 2 Wils. 296.]

Or, of the repair of a sea-wall, bridge, &c. R. Jon. 162.

Cleansing of a river, &c. 1 Mod. 48.

But toll-thorough cannot be claimed, simply without any consideration. R. Jon. 162. R. Mo. 575. 1 Mod. 47. 2 Mod. 143. 4 Mod. 320. D. cont. 1 Mod. 232. R. 1 Sid. 454. Per Poph. two J. cont. Cro. El. 711. 2 Rol. 522. l. 37. R. M. 12 G. 2. c. 13. 2 F. 221.

As, if one demands 2*d.* for every score of sheep that pass by such a town; for this would be a toll for passage in an highway. R. Mo. 575. Cro. El. 710.

So, toll for a ship that comes to such a point cannot be demanded without a consideration; for the sea is free for all. R. 1 Mod. 104.

For cattle that pass by such a bridge. Semb. 3 Lev. 400.

So, it cannot be claimed from those to whom the consideration does not extend; as, a custom, that upon consideration that the city of N. maintains a quay for all goods imported upon the river to the city, they ought to take for every ship upon the river, passing by the quay, so much, is not good for ships which do not load or unload at the quay. R. 1 Vent. 71. 1 Mod. 71. R. 2 Lev. 96.

[So, a prescription to take toll for passing through the streets of G. in consideration of repairing divers streets there, is bad; for that is no consideration for toll in the other streets which he does not repair. P. 6 G. 3. Wils. 296.]

So, it cannot be claimed as appendant to a manor, for it depends upon the will of a stranger, not of the lord himself; and therefore must be claimed as an easement. Kel. 152. a.

[A prescription to take toll for passing on an antient navigable river through the plaintiff's manor, is bad in law. C. P. T. 11 & 12. Geo. 2. Willes, 111. Vide 3 T. R. 263.]

[A prescription for toll-thorough cannot be supported in law, unless a consideration be shewn for it. Willes, 111.]

[In a declaration for toll, a consideration must be stated. 3 Burr. 1402. 1 T. R. 660.]

[*Aliter* of a toll-traverse, where a consideration is implied. Ibid.]

[But if a person claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were before the time of legal memory, in the same hands, though severed since; it will be presumed that the soil was originally granted to the public in consideration of the tolls, and such original grant is a good consideration to support the demand. 1 T. R. 660.]

[Toll may be severed from the soil whence it arises. 1 T. R. 660.]

(D a.) Toll-traverse.

Toll-traverse is a sum demanded for passage over what was at the time of granting the toll the private soil of another. Bl. Nom. verb. Toll. 1 Sid. 454. Cro. El. 711. 22 Ass. pl. 58.

And this toll may be demanded without alleging any consideration for it. Mo. 575. 2 Mod. 143.

[The consideration of toll-traverse is necessarily implied. Cowp. 48. 1 T. R. 660.]

As, if the lord of a manor has a wharf near a navigable river, and demands 2*d.* per ton for all goods put upon the land within his wharf, though he does not say, upon the wharf. R. 3 Lev. 425. 2 Lev. 97.

If the lord claims 2*d.* for all wares sold within his manor, without saying, in a fair or market. Dub. 4 Mod. 319.

[Prescription as lord of the manor for toll of all goods landed within the manor, in consideration of repairing a wharf within the manor (not confining it to the wharf), is valid. Cowp. 47.]

[The statement of a consideration in a declaration for toll-traverse, is unnecessary. 1 T. R. 660. Cowp. supra. Loft. 464.]

[(D b.) Toll on sales by sample.]

[Market toll on sales by sample, cannot be claimed. 4 Taunt. 520.]

[Proof that toll has always been taken for a commodity sold in the market by sample, which on the preceding market day had been brought into the market in bulk, but afterwards removed to a warehouse for want of buyers, coupled with proof of toll having been taken for the last 40 years on all sales by sample of such commodity, is evidence whence a general right to toll on sales thereof by sample may be inferred, though a time is remembered when it was not taken. 10 East, 476.]

[A corporation being entitled, by prescription, to toll on all wheat brought into the market, and there sold on the market day, but in which of late it had become the practice to sell by sample, they had claimed the like toll for corn sold in the market; held, that where A. bought of B. in the market by sample, to be delivered in the borough, A. knowing B. not to be a freeman, exempt from the toll, and the corn not to have been in the market, and the toll not to have been paid, and which corn was the next day delivered; the corporation could not maintain case against A. for such sale in fraud of the toll. Smith, 508. 6 East, 438.]

[Such sale is not even *prima facie* a sale in bulk. 6 East, 438. 2 Smith, 508.]

(E) Who may demand toll.

A man may be entitled to have toll by prescription or grant. 4 Mod. 319. [1 Wils. 109.]

So, if the soil, in which a fair or market is held by prescription, comes to the crown, neither the fair, &c. nor the toll there due, are extinguished. Mo. 474.

So,

So, if a manor to which toll is appurtenant, comes to the king, the toll continues appurtenant. 1 Mod. 232. 2 Mod. 144.

So, if the king grants a fair or market, he may also grant to the grantee to take a reasonable sum for toll. Mo. 474.

And the grant will be good; though the charter does not express the sum in certain. Per 3 J. Mont. cont. Pal. 86.

So, if a man builds a new bridge, or a wall against the sea, &c. the king may grant to him to take pontage, or murage; for it is for the ease of the people. Mo. 474.

But the king cannot grant a toll for goods not brought to market. Lut. 1502.

[Toll-bars cannot be erected out of the place for which toll is demanded. Bunb. 68.]

### (F) When no toll can be due.

But toll cannot be claimed except by grant or prescription.

So, though a man may make an agreement for goods landed out of a ship upon his land; yet he cannot take 2d. for every barrel, or other sum certain for goods landed there; for that would be to raise a toll or custom without the consent of the king. R. 2 Rol. 171. l. 10.

### (G) Who shall be quit of toll.

#### (G 1.) By prescription.

Persons may be quit of toll by prescription, or the king's grant; as a city, or borough, may prescribe to be quit of toll. F. N. B. 226. I.

The inhabitants of a borough may prescribe for passage in a ferry without toll. Adm. 1 Sal. 12. R. 3 Mod. 293.

So, the king is quit of all tolls by his prerogative. Pal. 85.

So, by the custom of the realm, tenants in ancient demesne may claim to be quit of toll in all fairs and markets within the realm, for goods bought or sold for or out of their tenements. F. N. B. 228. A. Vide Ancient Demesne, (F 4.)

So, by the custom of the realm, ecclesiastical persons ought to be exempt from pontage, murage, &c. Pal. 85. Vide Ecclesiastical Persons, (D).

#### (G 2.) By grant.

So, the king by his charter may grant, that the inhabitants of such a town, borough, &c. shall be quit of toll in every place in England. Lut. 1332. Vide Prerogative, (D 33.)

That such an abbot, bishop, &c. *et homines sui sint quieti ab omni theolonio in omni foro, nundinis, et transitu, per totum regnum.* 2 Rol. 202. l. 15.

But such grant, that he *et homines sui sint* quit of toll, &c. extends only to toll for their own proper necessities, not if they buy or sell as common merchants. 2 Rol. 202. l. 15.

[The citizens of London, whether resident or not, are exempt from the payment of all tolls and customs throughout England, and the ports of the seas, except the king's ancient custom and prizes of wine. 1 H. Bl. 206.]

[A pro-

[A provision exempting horses from toll "when attending cattle returning from pasture," only applies to horses actually in company with the cattle. 6 T. R. 706.]

[(G b.) Mode of Computation.]

[The additional toll under 14 G. 3. c. 82. s. 2. on an overweight, must be according to the progressive proportions named therein. Cowp. 365.]

[(G c.) Construction of grants.]

[The usage under an antient grant of toll, generally on specific goods passing in and out of the city, has been, to take 2*d.* for every horse drawing the cart containing the goods. The like toll is payable in whatever description of carriage they may be conveyed, and though principally designed and used for a different purpose to that of conveying goods. 5 East, 2. 1 Smith, 297.]

[(G d.) Pleadings.]

An averment in a declaration by the owner of a market, claiming toll in specie, that he is entitled to toll for goods sold within the market, means exclusively toll for goods brought into the market, and not as well for those sold therein by sample. 4 T. R. 104.

(H) Remedy for freedom from toll.

(H 1.) By writ *de essendo quiet. de thelonio*.

If a man who ought to be quit of toll be charged, he may have a writ *de essendo quiet. de thelonio*. F. N. B. 226. I.

[This writ is not merely prohibitory, but remedial, on which the parties may plead to issue on a question of right. C. P. E. 29 G. 3. 1 H. Bl. 206.]

[An action will not lie on this writ until the plaintiff's goods be distrained for toll. B. R. H. 31 G. 3. 4. T. R. 130.]

[If toll be merely claimed of the individual members of a corporation exempt from toll, an action on this writ lies in the name of the corporation. House of Lords, E. 36 G. 3. 1 Bos. & Pull. 487.]

[A corporation to whom this writ is directed, cannot be attached for contempt in their corporate capacity, for not returning it; but an attachment in the nature of a *pone* is the proper remedy to compel them to appear. Ibid. 1 H. Bl. 206.]

[Counting on the writ *de essendo quietum de thelonio*, is allowable in the first instance. 4 T. R. 130. 6 T. R. 778. 1 H. B. 206. 1 B. & P. 487.]

(H 2.) By actions.

So, if a man takes toll, when it is not due, or more than is due, or of him who is exempt, an action upon the case lies. R. 1 Sal. 12. Vide Market, (F 1.)

Or,

**TOWN CLERK.**

Or, trespass. Lut. 1329. 1 Sal. 248.

So, if the cattle or goods of any exempt are distrained for toll, he may have a replevin.

Vide more concerning toll in Antient Domesne, (F 4.)—London, 1.—Market, (F 1.) Turnpike.

~~Toll-boots.~~ Vide MARKET, (F 1.)

**TOLT.**

Vide DROIT, (B 5.)

**TOMBS.**

Vide CEMETRY, (C).

**[TONE, RIVER OF.]**

[The county were held not liable to repair the bridge over the Tone, whilst the trustees under st. 49 G. 3. c. 84. were executing, and before they had completed the powers thereby given. 16 East, 305.]

**TONNAGE & POUNDAGE.**

Vide PARLIAMENT, (H 12.)—TRADE, (C 1, &c.)

**TOUTS TEMPS PRIST.**

Vide PLEADER, (2 Y 5.)

**TOWER COURT.**

Vide COURTS, (O 8.)

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**TRADE**

## TRADE.

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(A) Liberty

## (A) Liberty of trade.

## (A 1.) By merchants strangers.

Trade is beneficial to the commonwealth. 11 Co. 86. a. 1 Rol. 4.  
All trades, mechanical or others, which avoid idleness, and exercise men in work for the maintenance of them and their families and the increase of their substance. 11 Co. 86.

By the st. M. Ch. 9 H. 3. 30. *omnes mercatores, nisi prohibiti, habeant saluum et secur. conduct. exire de Anglia, venire in Angliam, morari et ire per Angliam per terram aut equam ad emendum, vel vendendum.* Confirmed by the st. 2 Ed. 3. 9.

The *magna et parva custuma.*, and also tonnage and poundage, were granted for safeguard of the sea. 2 Rol. 175. l. 10. Vide in Parliament, (H 11, 12.)

By the st. 18 Ed. 3. 3. the sea shall be open to all manner of merchants to pass where they please.

So, by the st. of the staple, 27 Ed. 3. 2. all merchants strangers, not of enmity, may safely come and dwell in the realm, where they will, and thence return with their ships, wares, &c. and freely sell, &c. paying the customs due.

So, by the 14 Ed. 3. st. 2. 2.

So, by the st. 9 Ed. 3. 1. and 25 Ed. 3. 2. all merchants strangers, and denizens, or any other, may sell corn, &c. and every other thing vendible, to whom they please, foreigners or denizens, except the king's enemies; and any charter, proclamation, allowance, judgment, &c. to the contrary shall be void. Confirmed by the st. 11 R. 2. 7.

By the st. 2 R. 2. 1. all merchants aliens of amity with the king, may safely come within the realm; and in all cities, boroughs, &c. abide with their goods as long as they please without disturbance; and sell and buy in gross and by parcels to whom, and of whom they please. And return, &c. by the st. 5 R. 2. 1.

But this was restrained by the st. 16 R. 2. 1. that merchants aliens shall not sell by retail, except victuals.

## (A 2.) Remedy upon disturbance.

By the st. 9 Ed. 3. 1. (confirmed by the st. 2 R. 2. 1. 11 R. 2. 7.) he that gives disturbance to a merchant contrary to this statute, shall yield to the merchant double damages; and, if attainted, shall have a year's imprisonment, and be ransomed at the king's will.

By the same stat. if disturbance be to a merchant stranger, or denizen, in city, borough, &c. which hath franchise, and the mayor, &c. on request give not remedy, and be thereof attainted, the franchise shall be seised into the king's hands.

In a town which hath no franchise, if the lord, or his bailiff, or constable, &c. being required to do right, do it not, they shall yield to the plaintiff his double damages.

So, by the same stat. the chancellor, treasurer, and justices, assigned to

to hold the king's pleas, in the places where they come, shall inquire of such disturbances, and the same punish, &c.

Or, the king by commission under the great seal may assign persons to inquire and punish the same; and this was also allowed by the st. 25 Ed. 3. 2.

And by the same st. 25 Ed. 3. 2. every person who will sue (on such disturbance) may have a writ in the chancery to attach the disturber, and cause him to answer in the king's court.

And therefore, where a merchant stranger delivers his goods to a carrier, to be carried to a port, which are by him feloniously embezzled, he may sue in chancery for relief, where there shall be speedy dispatch, and need not proceed at the common law. 13 Ed. 4. 9. b.

So, by the st. 27 Ed. 3. 2. if any by colour of his office or otherwise, take any thing of merchants against their agreement, he shall be arrested by the mayor and bailiffs of the place, if out of the staple, or by the mayor and ministers of the staple, if in the staple; and speedy process shall be against him from day to day according to the law of the staple, and not at the common law.

So, by the st. 27 Ed. 3. 20.

And therefore, he shall have advantage of the law merchant, though it be not conformable to the common law. 13 Ed. 4. 9. b. 2 Rol. 114.

And shall have speedy remedy. 13 Ed. 4. 9. b. 2 Rol. 114.

(A 3.) But an alien shall not be a merchant or factor in the English plantations in Asia, Africa, or America.

But by the st. 12 Car. 2. 18. s. 2. no alien, unless naturalized, or made denizen, shall exercise the trade of a merchant or factor in any of the places there named, (viz. the lands, islands, plantations belonging, or which may belong, to the king or his successors in Asia, Africa, or America,) on pain of forfeiture of all his goods, or which are in his possession, &c.

(A 4.) Importation restrained.

So, by the st. 11 Ed. 3. 3. no merchant shall import cloths not made within the king's dominions, on pain of forfeiture of the cloths.

Nor, by the st. 3 Ed. 4. 4. woollen caps, or woollen cloths, cards for wool.

Laces, corsees, ribbands, fringes of silk and thread, laces of thread, silk twined or embroidered, laces of gold, of silk and gold, saddles, stirrups, harness to saddles, spurs, bosses of bridles.

And irons, gridirons, locks, hammers, pinsors, girdles of iron, latten, steel, tin, or alkmine, fire-tongs, dripping-pans.

Points, purses, gloves, girdles, harness for girdles, hats, brushes, Dice, tennis-balls, chess-men, playing cards.

Any thing wrought of tawed leather, tawed furs, buskins, shoes, galloches, or corks.

Knives, daggers, wood-knives, bodkins, sheers for tailors, scissors, razors, sheathes, pins, pattens, pack-needles, forciers, caskets, rings of copper or latten gilt, chafing-dishes, hanging candlesticks, chafing-balls,

sacring bells, curtain-rings, ladles, scummers, counterfeit basons, ewers, painted ware, or white wire thread, to be sold within this realm, (unless wrought in Ireland), on pain to forfeit the same; a moiety to the king, and a moiety to him who shall seize them.

So, by the st. 1 R. 3. 12. no merchant stranger shall import to be sold any girdles, harness for girdles, points, leather, laces, purses, pouches, pins, gloves, spurs, shears, shoe-buckles, bells, (except hawks' bells), curtain rings.

Knives, hangers, tailors' shears, scissors, andirons, cobbards, tongs, fire-forks, gridirons, stock-locks, keys, hinges, garnets, painted glasses, painted papers, painted forciers, painted images, painted cloths, beaten gold or silver for painters, saddles, saddle-trees, horse-harness, boots, bits, stirrups, buckles, chains, latten nails with iron shanks, turnets, standing candlesticks, hanging candlesticks, holy-water-stops, chafing-dishes, hanging lavers, tin or leaden spoons, latten or iron wire, iron candlesticks, grates, horn for lanthorns, on pain of forfeiture; a moiety, &c. *ut supra*.

So, by the st. 19 H. 7. 21. none shall import silk wrought by itself, or with stuff, in ribbands, laces, girdles, corses, calls, or points.

Nor, by the st. 25 H. 8. 9. and 33 H. 8. 4. any thing made of tin, or pewter.

Nor, by 5 Eliz. 7. rapiers, daggers, knives, hilts, pummels, lockets, chapes, handles, scabbards, or sheaths for knives, &c.

(A 5.) By the king's subject.—In foreign countries.

By the st. 15 Ed. 3. 3. the seas shall be open to all merchants to pass with their merchandize, where they please.

So, by the st. 3 Jac. 6. all subjects of England may trade to and from Spain, Portugal, and France, paying their customs and duties, notwithstanding any incorporation made by the king to any to have a sole trade there.

[By st. 23 G. 2. c. 13. any person soliciting, &c. any artificer in any manufacture of Great Britain or Ireland to go abroad, forfeits 500*l*. and imprisonment for one year; second offence 1000*l*. and two years' imprisonment.]

[Person exporting tools in the silk and woollen manufacture, forfeits the tools and 200*l*.; captain taking on board, 100*l*.; captain of king's ship, 100*l*., and cashiered; custom-house officer signing cocket, 100*l*., and forfeits his place.]

(A 6.) Within the kingdom. When they shall use a trade by the common law.

So, by the common law every subject may exercise himself in every lawful trade. 11 Co. 53. b. Hob. 211.

So, he may use several trades or mysteries, if he pleases. 11 Co. 54. a. Hob. 211. Cont. 2 Rol. 392. Pal. 396.

And the st. 37 Ed. 3. 6. which required that every man held himself to one mystery, was presently repealed. 11 Co. 54. a.

So, he might use a trade, wherein he had knowledge, though he never was apprentice, or instructed in it. 1 Sand. 312.

[By the maritime law, it is cause of confiscation in a subject to trade

trade with an enemy, provided he be taken in the act; but this does not extend to a neutral vessel. 1 T. R. 85.]

(A 7.) When not.

But by the common law a man cannot use a trade in which he is insufficient. 2 Rol. 392. Pal. 397.

And for a misfeasance to the prejudice of any, an action upon the case lies against him. 1 Sand. 312.

So, a man who professes one trade, cannot use a thing proper to another trade, though it be in reference to the commodities used in the trade which he professes; as, a bricklayer cannot do a thing proper to the trade of a plasterer, where they are distinct trades. R. 2 Rol. 391. But it was contrary to a bye-law. Pal. 396.

So, a wheel-wright cannot use the trade of a smith for making his wheels. Per Holt, Sho. 267.

[A trade is not transmissible, but is put an end to by the death of the trader; and if executors carry on trade, they must do it as individuals for their own advantage, and at their own risk, unless under the direction of the court of chancery. 1 T. R. 295.]

(B) Regulation of trade by the king's charter.

The king by his charter may constitute fraternities, or companies for the management of foreign or domestic trade.

For trade cannot be maintained or increased without order and government; and therefore the king may erect *gildam mercatoriam*, a fraternity or incorporation of merchants, for the advancement of trade. 8 Co. 125. a.

And none but the king can erect a society for trade. Skin. 224.

So, the king by his grant may require, that all ships which come to such an haven, unload in such a place, for the security of the customs. Hard. 55.

That ships shall unload in a public place, and not elsewhere. 1 Rol. 5.

That tonnage be paid at such a port, more convenient for the king's officers, and not prejudicial to the subject. Per Dod. 1 Rol. 5.

So, a grant by the king to the corporation of weavers in London, rendering a rent, that none shall intermeddle with their trade, unless he be free of their fraternity, is good. Hard. 55. Vide post, (D 1.)

So, a grant to London, that every one who brings saleable goods there, shall pay such a toll, will be good. Hard. 55.

So, the king by his patent may grant that such persons shall have the sole printing of books of the common law. 2 Ca. Ch. 67. Acc. in Domo Proc. 1 Ver. 120. Skin. 234. R. Cart. 90.

Or, the sole printing of almanacks. Semb. 2 Ca. Ch. 66. Skin. 234.

Or, the printing of the statute-books; for they are matters of state. 2 Ca. Ch. 76. 93. 1 Ver. 120. 275.

Or, English bibles. 2 Ca. Ch. 98. 1 Ver. 120.

So, by patent, the stationers have the sole printing of bibles, testaments, common-prayer-books. Cart. 90.

So, for civil-law books, school-books, almanacks. Cart. 90.

But a patent, granted to Moor by King James for the sole printing

of books of the common law, does not extend to new books of the law never printed before the patent. R. per ten J. 1668. 2 Ca. Ch. 67.

So, if the king grants power to the stationers for printing such books, he cannot afterwards grant to the university to print the same books. Dub. Skin. 234.

[The crown has not a prerogative or power to grant the printing of almanacks to the company of stationers, exclusive of any other. 3 T. R. 261.]

Vide post, (D 1. 4.)

### (C) Charge upon trade.

#### (C 1.) Customs of tonnage and poundage, &c.

So, merchandizes may be charged with customs or duties to the king.

By the st. 14 Ed. 3. sess. 2. 2. merchants shall be free to trade, paying their customs due.

The old and new customs originally commenced by parliament. Vide Parliament, (H 11.)

No customs are due but by common consent of parliament. Vide Parliament, (H 9, &c.)—Prerogative, (D 43.)

By the st. 12 Car. 2. 4. the parliament grant to the king on every ton of wine from France brought into the port of London by way of merchandize, by a subject born, 4*l.* 10*s.*; by an alien, 6*l.*; into any other port by a subject, 3*l.*; by an alien, 4*l.* 10*s.*

On every butt or pipe of sweet wines brought into the port of London, by a subject, 2*l.* 5*s.*; by an alien, 3*l.*; into another port by a subject, 1*l.* 10*s.*; by a stranger, 2*l.* 5*s.*

On every aum of Rhenish or German wine by a subject into any port, 1*l.*; by a stranger, 1*l.* 5*s.*

By the st. 1 Ann. 13. s. 112. Hungary wines imported by Hamburg shall pay as German wines.

By the st. 12 Car. 2. 4. on all goods carried out of the king's dominions, or brought into the same by way of merchandize, by subject, denizen, or alien, poundage of 12*d.* for every 20*s.* value, according to the valuation in the book of rates; and 12*d.* more per pound by a merchant stranger for native commodities exported, except such as in the same book are custom-free.

And by the same st. s. 3. if any goods be shipped or put into a boat or vessel to the intent to be carried beyond sea, or be brought from beyond sea into any port, &c. by way of merchandize, and unshipped, &c. the customs due not paid or tendered to the collector or his deputy, with consent of the comptroller or surveyor there, or one of them, nor agreed for at the custom-house, shall be forfeited; a moiety to the king, a moiety to him who shall seize or sue for the same.

#### (C 2.) Due upon importation.

And therefore the goods are forfeited, where bulk is broke, or there is a manifest intent to do it, before the customs paid, tendered, or agreed for. Forst. 47. R. Hard. 360.

So, any goods imported to be sold, though they are taken by way of reprisal. R. Cro. El. 534.

So,

So, by the common law customs are due by the importation, where any act is done by way of merchandize; as bulk broken, part of the goods sold, &c. Per Hale, Hard. 362.

So, by the st. 12 Car. 2. 4. goods on importation are liable to customs, though by the first rule of rates they are not paid till the landing, and for so many goods as are put upon land. Ibid.

And therefore, the information must say that they are imported by way of merchandize; for it is not sufficient to say that they were put upon land as merchandize. R. Cro. El. 534.

[If a ship is within the limits of the port, it shall be deemed an importation; as, if it be twenty miles below the Hope, it is within the limits of the port of London. Bunb. 79.]

[Information for treble value, on stat. 8 Ann. c. 7. s. 30. for assisting, &c. at the time of unshipping, in unshipping wines, lies only against persons actually present. Bunb. 227.]

[But if a person, though not present at the running or carrying to his house, afterwards pays the men for doing it, it is a being concerned, and information lies. Bunb. 247.]

[If the information is for assisting, or being otherwise concerned, *tempore exonerationis*; yet personal presence is not necessary, if he gave particular directions when and where the goods were to be landed and received. Bunb. 277.]

[Wheat-meal imported shall pay duty as wheat by 22 Car. 2. Bunb. 281.]

[Goods (as wearing apparel) not imported as merchandize, are not liable to pay any duty, by 13 & 14 Car. 2. c. 11. Str. 943.]

[Ships taken as prizes by British men of war are liable to, and must pay 5*l.* per cent. duty charged on goods by 12 C. 2. c. 4.; but though liable to other imposts created since 1665, yet they have never been paid, and it is considered as a waiver. Parker, 198.]

[But foreign sails of such ships taken are not liable to 1*d.* per ell by 12 Ann. c. 16. & 19 G. 2. c. 27.; for when the ship becomes British, the sails do so too. Ibid.]

### (C 3.) When not due.

But goods wrecked are not forfeited, though the customs are not paid. Cro. El. 534. R. Vau. 161. Vide Wreck.

So, by the st. 12 Car. 2. 4. s. 15. prize wines ought not to pay tonnage of custom.

So, by importation, if it be not by way of merchandize; as, by default of victuals, stress of weather, &c. customs are not due till landing. Per Hale, Hard. 362.

So, if an agreement be made for customs with the deputy of the customer, who acts as such, though he be only the deputy of a deputy; for the merchant cannot examine his authority. R. Cro. El. 584.

So, if the agreement be for all goods generally, without shewing the particular goods imported, when they are goods taken by way of reprisal, the certainty of which is not known. R. Cro. El. 534.

So, where tonnage and poundage is given by the st. 12 Car. 2. 4. viz. 12*d.* per pound, and by another statute an additional duty of 6*d.* per pound is given, and 5*l.* per cent. allowed to the merchant by the

first act, the allowance shall be the same out of the additional duty, for they are incorporated. Per three Bar. Hard. 349.

So, by the st. 12 Car. 2. 4. on due entry made of wines imported, 12l. per cent. shall be allowed for leakage. But this shall be upon entry of the whole quantity put on board the ship. R. Hard. 360.

And by the same statute, s. 4. if the goods of a subject born be taken on the sea by enemies or pirates, or perish in a ship taken or perishing, whereof duties were paid or agreed for, on proof, &c. before the treasury or chief baron, recorded and allowed in the Exchequer, and certified to the officers of the customs, he, his executor or administrator, may ship in the same port so much other goods as those lost amounted to in custom, without paying any duty.

So, by the st. 12 Car. 2. 4. s. 14. all wines imported in London, or elsewhere, shall be free from the duty of excise.

#### (C 4.) Drawback and bounty allowed.

By the st. 12 Car. 2. 4. s. 19. if wine, for which the additional duty is paid or secured, be exported in twelve months after importation, the duty shall be repaid, or the security discharged. Vide infra.

By the st. 1 Jac. 2. 4. s. 4. 7. importer of tobacco and sugar, on exportation in eighteen months, shall be repaid the duties by him paid on the importation, or on a certificate of bond to export in four months by the buyer, and certificate of the searcher, that they have been shipped, and oath by the merchant that they have not been re-landed, &c. the security for duties by this act shall be discharged; but the duties of this act continued only to 1693. (Continued by 7 W. 3. 10. till 1706, by 8 Ann. 13. till 1720.)

By the st. 1 W. & M. sess. 2. 6. merchant exporting coffee, tea, or chocolate, in six months after importation, shall be repaid two-thirds of the duties by him paid by virtue of the said act.

So, by the st. 9 Ann. 11. s. 39. on exportation of leather.

So, by the st. 2 W. & M. sess. 2. 4. on exportation of East-India goods, wrought silks, &c. in twelve months after importation, the duties thereby laid shall be wholly repaid, or the security vacated.

So, by the st. 4 & 5 W. & M. 5. s. 6. on exportation of goods charged by that act, except brandy.

And, by the st. 6 & 7 W. 3. 18. s. 12. on exportation of glass, stone and earthen wares.

By the st. 9 W. 3. 23. s. 9. on exportation of sugar refined in England, 3s. per cent. allowed.

By the st. 1 Ann. sess. 2. c. 3. s. 18. on exportation of malt, drawback of duties paid.

So, by the st. 12 Ann. 2. s. 21.

By the st. 9 Ann. 12. and 10 Ann. 19. on exportation of hops, soap, paper, &c.

By the st. 7 Geo. 20. s. 10. the merchant shall be entitled to his drawback, if he ship his goods in three years.

By the st. 3 Geo. 7. s. 40. all drawbacks on any goods shall continue till the duties cease.

But by the st. 4 & 5 W. & M. 15. s. 13. no debenture of drawback shall be admitted but on oath by the real exporter, as interested in the propriety and hazard of the goods exported, or acting by commission  
is

is concerned in the direction of the voyage, so as to be able to judge that the goods are really and *bonâ fide* exported, and not relanded or intended to be relanded.

By the st. 6 & 7 W. 3. 18. s. 12. oath on exportation of glass, stone, and earthen wares shall be, that the duties were truly paid or secured; and security shall be given, that they shall not be relanded before the customer or contrroller of the port.

By the st. 7 W. 3. 10. s. 5. on exportation of tobacco the debenture shall be on parchment, and the oath printed thereon *in hæc verba*, signed and sworn by the exporter, that all the tobacco there certified, is really exported beyond the seas on his own account, or on account of A. for whom he acted by commission, and is not landed, nor intended to be relanded in England.

And by the st. 8 Ann. 13. s. 16. exporter, or other concerned in relanding, &c. forfeits double the value of the drawback, and the boats, horses, &c. used in it.

And by s. 18. no debenture shall be allowed on exportation of tobacco for Ireland, till certificate, &c. of landing there.

(So, by the st. 5 Geo. 11. s. 5. on exportation of any goods for Ireland.)

Nor, by s. 20, on exportation of any tobacco in ships under twenty ton.

So, by the st. 6 Geo. 21. s. 49. if tobacco, entered as exported for foreign parts, shall be landed in Ireland, double the drawback shall be forfeited, and the debenture for the drawback shall become void.

[No drawback is due for pepper, unless exported within the year, or prevented by accident. Parker, 266.]

[If the property is changed after shipping for exportation, the drawback is lost. Parker, 266.]

[Salt shipped for or landed in Scotland does not discharge debenture. Parker, 269.]

[Bark imported in the rough state and pulverized here, is not entitled to the drawback on exportation under 27 G. 3. c. 13. 2 Anst. 346.]

[The general shipper of beer for exportation is entitled to the drawback, whether or not the master has shipped sufficient for the consumption of the voyage, or paid the duty on such quantity. 16 East, 376.]

[The price of barley at the port is the rule of the bounty upon the exportation of strong beer, and not the average price of barley throughout the kingdom. Cowp. 66.]

[If one bushel of corn is shipped in time to get the bounty, with intention to ship the rest afterwards, the whole put on board is entitled to the bounty under 31 G. 3. c. 30. 2 Anst. 444.]

[No bounty is due under 44 Geo. 3. c. 10. s. 2. on the exportation of foreign corn, unless the average price is published as provided by the act. 2 Smith, 565.]

[The bounty given by 26 Geo. 3. c. 81. on the buss fishery for herrings, is not payable where the buss lies in port, and sends out her boats to fish. 8 Anst. 926.]

[Unless a vessel has proceeded out of the limits of the port with her cargo, it is not such an exportation of the goods as will protect the cargo from duties subsequently imposed on the exportation of goods of the

samenature, although she is not only freighted and afloat, but has gone through all the formalities of clearing, &c. at the custom-house, and has paid the exportation duties. And all such new imposts as are laid on such goods attach while the vessel is water-borne within any part of the port. 2 Price, 381.]

### (C 5.) Aulnage.

By the st. de prov. 27 Ed. 3. 4. is granted to the king for every cloth to be sold, above the customs due, a subsidy; viz. for every cloth of assise not in grain, 4*d.*; half in grain, 5*d.*; of scarlet, 6*d.*; of every half such cloth, half so much; but nothing for cloth less than an half cloth, or made for the use of him and his family, or, if sold again, when it hath once paid.

And the aulnager shall take for his fee of the seller for every cloth of assise a halfpenny, for every half cloth a farthing, and no more.

The aulnager is an officer appointed to measure by the aulne, or ell, all cloths, and collect the duties for the cloths so measured. Nom. verb. Alnage.

This statute gives the first duty of aulnage upon cloths. Hard. 206. Semb. cont. Hard. 214.

By the stat. 11 H. 4. 6. the aulnager shall have a new seal, and set it, after search and survey, to all cloths and dozens.

And by the several statutes 17 R. 2. 2. 1 H. 4. 13. 9 H. 4. 2. 11 H. 4. 6. 11 H. 6. 9. 1 R. 3. 8. 4 Ed. 4. 1. 8 Ed. 4. 1. and 8 El. 2. several regulations are made with respect to the measure and sealing of cloths, and the appointment, office, and duty of aulnager.

By these statutes the duty of aulnage shall be paid for new cloths made of wool, though not named in any of the statutes. R. Hard. 205. 215.

### [(C 5. b.) Other duties.]

[Canvas is linen within the statutes of excise imposing duties on painted linen. 3 Price, 360.]

[Where canvas has been previously primed, it is not liable to any farther duty for being afterwards painted, the primer having paid a duty in the first instance, in respect of the colour necessarily laid on in that preparatory operation. 3 Price, 360.]

[The scenes of the theatres, and all other canvas so painted, are liable to the duties of excise as painted linen. 3 Price, 360.]

[By 24 G. 3. c. 73. the duty on spirit attaches on the wash before distillation. 2 Anst. 558.]

[An accidental loss of wash, made for extracting spirits, after the duties are charged thereon, does not entitle the manufacturer to relief from those duties, as for an overcharge under st. 26 G. 3. c. 73. s. 1. 7 T. R. 56.]

### (C 6.) Search and seizure of goods forfeited, and proceedings afterwards.

By the st. 12 Car. 2. 19. (made perpetual by 3 G. 7.) if any cause goods to be conveyed away before entry made, and the customer, &c. agreed

agreed with, on oath before the lord treasurer, any of the barons, or chief magistrate of the place where the offence was committed, or next adjoining, the said lord treasurer, baron, &c. may issue a warrant to any, with the assistance of the sheriff, justice of peace, or constable, to enter the house where the goods are suspected to be, who may enter in the day within a month after the offence; and, in case of resistance, break open the house, and seize the goods concealed.

But by this statute, if the information, on which the house is searched, proves false, the party grieved may in trespass recover his damages and costs.

[On an action against an officer for a seizure, probable cause is no defence; he seizes at his peril. Str. 820.]

[Officer informing, and with warrant from commissioners of excise or justice of peace, entering house, is liable to trespass if he finds nothing. 3 Wils. 434.]

[Whether commissioner or justice granting warrant is liable to action, if good ground of suspicion is not laid before him. Q. De Grey C. J. Semb. cont. Gould J. and Blackstone J. Semb. pro. The words of the act are, if he shall judge it reasonable. Ibid.]

[Officer informing, and with writ of assistance entering house, if he finds nothing, is a trespasser *ab initio*. Anon. 3 Wils. 437.]

[On a writ of assistance, if the officer enters without a constable, he is a trespasser, though he finds uncustomed goods; and, if in a town or county of itself, the constable must be of the town, not of the county at large. Anon. 3 Wils. 63.]

After seizure for any cause, the officer shall transmit an account thereof to the solicitor of the customs in London, who shall enter it in his book, and, by a clerk in the remembrancer's office, shall have a writ of appraisement directed to the sworn appraisers in the port of London, or, if the seizure be elsewhere, to the collector, &c. of the port where the seizure was, or other persons near, to make an appraisement. M. P. Ex. 139. 216.

The appraisement shall be made by two or more upon oath. M. P. Ex. 140. 218.

Afterwards, the writ shall be returned with an indenture annexed, containing the name of the seizor, and the time and quantity of the goods seized, which, being registered by the register of seizures in the port of London, shall be returned to the office out of which the writ issued, and the goods shall be proclaimed in court. M. P. Ex. 140. 248.

In the mean time an information shall be filed, having the same day, with the writ of appraisement, at the suit of the officer who seizes, and being signed by a baron, shall be inrolled with the writ, indenture, and proclamation. M. P. Ex. 141.

[Regularly, the writ of appraisement and delivery cannot issue till the information is in; but by consent it may issue in the vacation, defendant giving security; and when the information comes in, the court may order a new writ, and the old appraised value to be returned on it. Bunb. 27.]

[If goods are appraised too high, the court may grant a new writ of appraisement. Bunb. 49. 185.]

[If

[If goods condemned are bought, and afterwards seized, the condemnation cannot be given in evidence, but must be pleaded. Per two Barons, contra one. Bunb. 52.]

[But if the goods have been sold by the purchaser to a third person, he may give parol evidence of their being condemned goods.]

[On information of seizure of British and foreign coins, no need of writ of appraisement or second proclamation; judgment may be for the coins themselves. Parker, 57.]

If no claim be entered within eight days, if the seizure was in the port of London, if in another port within 14 days, after the proclamation made, and a rule for it entered upon the indenture, the goods are condemned, and the seisor shall make a debet, and thereupon pay a moiety of the appraised value into the exchequer, whereupon the goods shall be delivered to him by order of the commissioners of the customs. M. P. Ex. 141. 143.

[Claim, before writ of appraisement returned, must be entered in the book in the office; but if after the return, it must be indorsed on the writ.]

[Since 8 Ann. the court will not make the claimant, though in low circumstances, swear to his claim, though of 10,000*l.* value. Bunb. 21.]

[If the goods in one seizure by two officers are appraised and condemned by two writs, and the goods not particularly described, and no information, so no condemnation on the roll; though the goods are sold, and the moieties paid to the crown and the officer, the court will set aside the condemnation, and order an attachment against the officers. Bunb. 89.]

[Tea was seized, and part carried away then, and the rest sealed down and carried away afterwards, and on this two writs of appraisement, and two informations; which were not set aside, the court being divided. Bunb. 96.]

If upon proclamation any one offers more than the appraised value, his name shall be recorded upon the indenture, and charged with the sum offered; and if there be no claim, he shall have a writ of delivery signed by a baron, paying a moiety into the exchequer, and a moiety of the appraisement, and the sum advanced, to the seisor. M. P. Ex. 142.

[On seizure, information should be filed, then writ of appraisement taken out; on the return, defendant enters his claim, and may move for a writ of delivery; if prosecutor delays filing information, or suing writ of appraisement, defendant, on entering his claim, may move for a writ of delivery; no certain rule as to delay; but if seizure in vacation, and no information filed next term, if it could have been tried that term, it is ground for a writ of delivery. Bunb. 30.]

[A bidder shall not be discharged, though goods sink in value, pending a claim put in after the bidding; and the court may order execution by *f. fa.* against him, and not accept of the forfeiture of the bidding-money. Regularly, the process of the pipe should issue. Bunb. 76.]

[If the bidder has been at expence, the court will not rate the fine, though a composition be made by licence between the officer and the claimer. Bunb. 100.]

[In

[In rating the fine, the court will inquire if there is any bidder, and take his interest into consideration. Bunb. 116.]

[It is discretionary in the court to grant a writ of delivery or not; and they will not for tobacco stalks, though wetted at sea. Parker, 196.]

[The court refused a writ of delivery for a ship seized ten days before, though loaded with perishable commodities, on a suspicion it was going to Gottenburgh. Bunb. 21.]

[Removing goods from one port to another, without a permit, is an unlawful importation, and not within the jurisdiction of the excise; and if such goods are seized by their officer, on an information before them, the court of exchequer will grant a writ of delivery. Bunb. 106.]

[If the witnesses for informer are at great distance, old and infirm, and unable to travel in winter, it is good ground to deny writ of delivery of goods for delay of prosecution on 14 C. 2. c. 11. Parker, 92.]

[On seizure of perishable goods, court has power to order sale without consent of claimer. Parker, 70.]

[But pending error, not. Ibid.]

[Or, if it does not clearly appear that the goods are perishable. Ibid.]

[Watches are perishable goods. Bunb. 74.]

[The party may proceed in the exchequer, or before the justices; and if there is no delay in them, the court will not interfere. Bunb. 139.]

[Justices of peace have jurisdiction of seizure of brandy, wherever it is; but of the waggon and horses only, if they are running goods from the water-side. Bunb. 130.]

[On an information *qui tam*, for importing brandies in unsizable casks, the court ordered they should pay duties, though the statute says they shall be forfeited. Bunb. 44.]

[On information for running goods, filed, but not entered in the book, *capias* may issue as the first process. Bunb. 209.]

[There is no right to seize contraband goods, unless they are landed or offered to sale; mere bringing the ship into port gives no right to seize. 2 Wils. 257.]

[If goods prohibited from being sold in this country by st. 11 & 12 Will. 3. c. 10. are taken out of a warehouse, and put on board a vessel as if for exportation, but in fact with a view to be relanded, they are liable to be seized, though no attempt has been made to reland them. 1 Bos. & Pull. Rep. 267.]

[If a custom-house officer seizes goods, exhibits information, and proceeds to condemnation, the right of action (enacted to be brought in a month for a pecuniary penalty) attaches in him, and no other can bring the action till a month from the condemnation. 3 B. M. 1357.]

[Attorney-general (as well as officer) has costs by 8 Ann. c. 7. where judgment for the king. Parker, 91.]

[On information for the king and the party, defendant is not entitled to judgment; as, in case of a nonsuit in an action on 14 Geo. 2. c. 17. Parker, 92.]

[An officer may sue *qui tam*, &c. though he has no right to any part of the forfeiture or benefit from it.]

[*A fortiori*, if he is to have a collateral reward.]

[In such case judgment for the king alone. Parker, 105.]

[Information

[Information for penalty abates by defendant's death after trial, and before judgment, and this may be suggested on the roll, and confessed by attorney-general to save writ of error. Parker, 264.]

[The court stopped an action because defendant would not admit the seizure, which the officer could not prove, though two terms had passed before the information filed. Bunb. 37.]

[If a seizure is made by a proper officer, and a condemnation in the exchequer, B. R. will not examine the property on an action of trover; but if by a stranger, it will. Str. 952.]

[An enemy's ship with prohibited goods may be seized by custom-house officer, though already seized as a perquisite of the admiralty; and prohibition shall go against admiralty. Parker, 273.]

[Prohibited goods (as French wines in time of French war) bought with the king's money, and imported for the use of his family, are not forfeited. Parker, 274.]

[On information of seizure, it is not necessary to set forth the quantity nor kind (because they are made certain by the writ of appraisement); but in information of *devenerunt* it is necessary, and for want thereof, judgment shall be arrested. Parker, 278.]

[Where there is a penalty which may be sued for by a common informer within a year, attorney-general may file information for discovery, waiving penalties, after the year, but not before; if he doth, defendant may demur. Parker, 279.]

[By st. 3 G. 3. c. 22. all ships and goods (except those liable to be burned) seized by officers of customs, shall be sold to the best bidder, and the price go half to the officer, half to the king.]

[Any vessel not above 50 tons, having foreign spirits, (except two gallons a-head for the crew), or tea or tobacco, on board, in any harbour, or hovering within two leagues of shore, is forfeited, and shall be burned, or used in the king's service.]

[By st. 5 G. 3. c. 43. goods paying duty *ad valorem*, under-rated, may be carried by officer to the king's warehouse, the collector to pay the value sworn to, and 10s. per cwt. addition, and the duties paid to the proprietor; the goods to be sold, the money advanced to be replaced, and the surplus paid, half to the officer, half to the sinking fund.]

[By st. 9 G. 3. c. 6. excise officers may seize horses and carriages used in smuggling foreign spirits.]

[The st. 26 G. 3. c. 77. s. 13. which enacts that no person shall prosecute "any action, bill, plaint, or information, in any of the king's courts," for the recovery of any excise penalty, &c. unless prosecuted by the attorney-general or some revenue officer, is confined to the superior courts of record; and therefore an information for a penalty for removing wax candles may be prosecuted before the commissioners of excise by one not averred to be such officer. 2 East, 362.]

[Goods shipped as for exportation, but with the intention of re-landing contrary to law, are liable to seizure, though on board. 1 B. & P. 267.]

[A seizure as contraband, is not justifiable before landing, or offer for sale. 2 Wils. 257.]

[(C b.) Cr.]

## [(Cb.) Excise commissioners.]

[The powers of the commissioners of excise as to the excise laws within the bills of mortality, and those of justices of the peace in all other places, are co-extensive. Dougl. 55.]

It is not necessarily essential to an order of the commissioners of customs made under the 51 Geo. 3. to restore goods seized, that any terms or conditions should be imposed on the proprietors by the order; and the court will not refuse to stay proceedings on a writ of appraisement on that ground, although the application proceed from the crown. But they will not quash the writ if regularly issued. 1 Price, 4.]

[A condemnation of goods by the commissioners of excise, is not conclusive. 2 Blk. 1174.]

## [(C c.) Excise officers.]

[In searches by excisemen, where the presence of a peace officer is required, one reputed to be an officer attending the rotation justices is not sufficient. 2 Blk. 1135.]

[The authority of a custom-house officer to seize uncustomed goods, &c. is not limited to the precinct to which he is nominated, unless so expressed in his deputation. 13 East, 506.]

[In an action by the owner of goods for money paid to a custom-house officer, to redeem them from a seizure, to which, at the time of payment, it appeared they were not liable, notice of action under st. 23 G. 3. c. 70. s. 30. is not requisite. 4 T. R. 485.]

[The provision in the st. 23 G. 3. c. 70. s. 30. requiring notice of action to be given to custom-house officers, is confined to actions of tort, since the object is, that they may tender amends. 4 T. R. 487.]

[In *assumpsit* against an excise officer to recover back duties paid to him; there must be notice of action, pursuant to st. 23 G. 3. c. 70. s. 30. 4 T. R. 553.]

[An excise officer is entitled to notice of action under st. 23 Geo. 3. c. 70. s. 30. if he believed that he was acting in discharge of his duty, and if the facts which he supposed to exist would, had they existed, have justified his conduct. 5 T. R. 1.]

[Semble, an extra exciseman is entitled to notice under the excise laws, on actions brought against him for any thing done in pursuance of any of the excise laws. 2 Smith, 220.]

[An officer of the customs, sued in trover for seizing a smuggling vessel, and held to special bail, shall not be discharged on a common appearance, unless the true foundation of the seizure be shewn, and that the defendants are doing all in their power to procure a condemnation. 2 Blk. 1018.]

[A custom-house officer has not a right to a second gauging of a vessel, before he grants a permit. Loft. 204, 205.]

[Previous to 23 Geo. 3. c. 70. trespass lay against custom-house officers, for entering a house and searching for smuggled goods, if none were found. 3 Wils. 61. 2 Wils. 405.]

[Trespass lies against an excise officer for breaking and entering the plaintiff's house, under a warrant of the commissioners of excise, obtained upon

upon the defendant's own information of suspicion, which proved unfounded. 3 Wils. 434. 2 Blk. 912.]

[Trover lies against custom-house officers, for seizing and carrying to the king's warehouse goods not seizable. 5 Burr. 2657. 3 Wils. 146.]

[If exorbitant fees are taken by a custom-house officer, from the master of a vessel, upon his taking out a coquet and bond pursuant to 13 & 14 Car. 2. c. 11. s. 7.; though the statute imposes the duty on the master personally, the owners may recover the excess in assumptive for money had and received. Cowp. 805.]

[If an excise officer pay over to his superior, duties received, but which the party paying them is entitled to recover back, the superior, not the officer, must be sued. 4 T. R. 559.]

[Upon not guilty in trespass, excise officers executing a body warrant issued by the commissioners, may give the special matter in evidence. 2 Blk. 1254.]

[A judge's certificate in an action, against a custom-house officer for entering the plaintiff's house, &c. and seizing his goods, "that there was probable cause for the seizure," covers the seizure only; that a general verdict will clear the case from the operation of st. 23 Geo. 3. c. 70. s. 29. and 26 Geo. 3. c. 40. s. 31. 1 H. B. 28.]

[*Onus probandi* payment of duties lies on the claimer on prosecutions in the exchequer; but in actions of trespass for taking the goods, the *onus* of proving non-payment lies on the defendant. 2 Blk. 813.]

[If an officer of the excise pays money into court, in an action duly instituted against him, for seizing goods not exciseable, having omitted to tender amends before the action, he shall recover only single costs, although the jury afterwards find a verdict for him, on the ground that the money paid into court was equivalent to the damages sustained by the plaintiff. 1 H. Bl. 244.]

[An action of trover, like that of trespass, against an officer for goods seized under st. 26 Geo. 3. c. 40. s. 27. must be brought within three months from the original seizure, notwithstanding the pendency of process in the exchequer. 2 East, 254.]

[The limitation of three months, within which actions against excise officers must be brought, must be reckoned from the act of seizure, notwithstanding the pendency of a suit in the exchequer. 1 H. B. 14.]

[The court will set aside condemnation of the subject of seizure after the expiration of the usual time of fourteen days allowed for entering claim, on satisfactory affidavit of merits. 1 Price, 48.]

[The court will not, in a motion for an order on the officers of the customs, decide a material question of revenue, viz. from what time the exportation of corn, so as to entitle to the bounties, is reckoned. 1 Anst. 269.]

### [(C d.) Custom-house.]

[The practice of making prime and post entries at the custom-house is illegal. 2 Blk. 963.]

(C e.) Sta-

[ (C e.) Statutes.]

[The distinction between the excise laws properly so called, and laws for raising inland duties under the management of the commissioners of the excise, is this; the former relates only to liquors; the latter to malt, dry goods, and other articles which have been put under the management of the excise commissioners. 2 T. R. 510, 511.]

[The clause of reference in the excise laws to former laws, amounts to this; that all the general powers and provisions given and made in acts *in pari materia*, shall be virtually incorporated into these; but that such provisions as are always considered as special provisions shall not. 2 T. R. 510.]

[The words "on shore," used in st. 24 Geo. 3. sess. 2. c. 47. s. 15. mean on land; and therefore an excise officer, seizing soap in the execution of his office, at an inland place, is within the scope and protection of the act. 1 B. & P. 187.]

(D) Restraint of trade.

(D 1.) By the king's charter.

The king by his charter cannot make a total restraint of trade, for such a patent will be void. 3 Mod. 132. Vide ante, (B).

Though it relates only to pastime or recreation, &c. 11 Co. 87. b. Vide in Prerogative, (D 36.)

Though it be the trade of a merchant, or a mechanic trade. 1 Rol. 4.

And therefore the king, by his patent, cannot restrain any, that he shall not trade by sea. 1 Rol. 4.

Nor, can he grant to an abbot, that he alone shall have such a port. 1 Rol. 5.

So, the king, by his charter, cannot make a grant, that none shall use his trade within such a town, unless he be free of the same town. R. 8 Co. 125. a. Adm. Lut. 564. Vide in Bye-law, (B 3.)

That none practise physic without a licence from the college of physicians, unless it was confirmed by parliament. Per two J. 1 Rol. 5. Vide in Physicians, (A).

That all sweet wines imported into England be landed at Southampton, and not elsewhere. 2 Rol. 114.

That all merchandizes imported into such a city be left at the Guildhall there for 40 days. 2 Rol. 113, &c.

That none shall use a trade, unless he be a member of such a corporation. Dub. Hard. 55.

So, the king, by his charter, cannot grant that such a corporation, &c. shall use a trade at such a place, exclusive of all others not free of the same corporation. Dub. 3 Mod. 127. R. Hard. 108, 9. Dub. Comb. 53. R. Skin. 361.

Or, that such and such deal in such and such commodities, exclusive of others. 2 Rol. 174. l. 45. Vide post, (D 4.)

That A. shall have the sole printing of bonds, &c. which others printed before. Semb. 3 Mod. 77.

That only 100 persons shall trade there. 1 Rol. 4.

That

That the master, wardens, and fraternity of Trinity Isle in Ireland shall have the sole buying and selling of merchandizes imported into the city of Dublin. 2 Rol. 113.

That if any trade to the Canaries, without leave of such and such persons, his ship and goods shall be forfeited. R. 1 Sid. 441. 1 Mod. 18. 1 Vent. 47.

That a corporation shall have the sole trade to the East Indies, though it be a country of infidels. R. cont. 3 Mod. 127. Skin. 132. 165. 197. 223. Vide infra.

So, the king, by his charter, cannot make a monopoly. Vide post, (D 4.)

But where a place for trade is discovered, with the great peril of any persons, the king may grant to them the sole trade there; as, the trade to Greenland. Adm. 1 Rol. 5.

The trade to the East Indies, to the East India Company only. D. 2 Rol. 115. Semb. 1 Ver. 130. 307. 2 Ca. Ch. 165. R. cont. as it seems. Skin. 334. 361. R. acc. 36 & 37 Car. 2. Skin. 132. 165. 197. 223. 3 Mod. 127.

[The st. 9 & 10 Will. 3. c. 44. in consideration of a large sum of money advanced by the East India Company gave them the exclusive right of trading there, subject to a redemption on the part of the public by repaying the money advanced, and giving three years notice. Several acts of parliament, in the reigns of Queen Anne, George the Second, and in the present reign, have confirmed and continued this exclusive right of trading, which has never yet been put an end to. The st. 33 G. 3. c. 52. has brought together in one code almost all the statutes respecting the East India Company. This last statute has repealed such parts of the statute of William as inflicted penalties, &c.; and says that no acts or parts of acts thereby repealed, shall be pleaded or set up in bar of any action, &c.; yet it is competent to underwriters who have subscribed policies on ships trading to the East Indies, in contravention of the statute of William, to avail themselves of the illegality of such trading in an action brought on the policies. B. R. T. 36 Geo. 3. 6 T. R. 723. Ex. Ch., E. 38 Geo. 3. 1 Bos. & Pull. 272.]

[The sales of the E. I. Company being subject to a regulation that any buyer not making good the remainder of his purchase money on or before the day limited for such payment, should forfeit the deposit, and should be rendered incapable of buying again at any future sale, until he shall have given satisfaction to the court of directors; held that the term satisfaction must be construed to mean pecuniary compensation for the non-performance of an agreement to pay on an appointed day, and that a buyer having made default on the day, but afterwards within a further time given to him by the company, paid the remainder of the purchase money with interest, might maintain an action against the company for refusing to allow him to become a bidder at their sales, such sales being declared by the st. of William to be public and open sales. C. P. H. 42 Geo. 3. 3 Bos. & Pull. 55.]

[Quære whether since the passing of the stat. 18 Geo. 2. c. 26. which regulates the deposits, forfeitures, and incapacities of bidders at the tea sales of the company, the company can make or enforce any other regulations]

gulations affecting those sales than such as the act of parliament has enacted. *Ibid.*]

[Under the late treaty between this country and the United States of America, referred to in st. 37 Geo. 3. c. 97. it is not necessary that the trade from America to our settlements in the East Indies should be direct; it may be carried on circuitously by the way of Europe. B. R. M. 39 G. 3. 8 T. R. 31. Ex. Ch. E. 39 G. 3. 1 Bos. & Pull. 430.]

So, the king, by his charter, cannot impose the forfeiture of goods, upon pretence of a regulation of trade. 1 Ver. 307. Semb. 1 Vent. 47. *Vide Prerogative, (D 38.)*

So, he cannot inhibit the importation of goods, except at such a port. 2 Inst. 61.

[Chancery will never establish a right claimed under a charter from the crown, till there has been an action at law to try the right. 2 Atk. 484.]

### (D 2.) By by-law or custom.

So, a by-law for the total restraint of trade will be void. *Vide By-law, (C 3.)*

So, a custom which makes a total restraint of trade will be void; as, a custom that he shall not use a trade in such a city, &c. unless it be founded upon some consideration. Mo. 342. Sti. 111. R. 2 Lev. 210. R. 3 Lev. 241.

So, a by-law, that he shall not use the trade of a tailor, &c. without licence, &c. does not extend to him who makes vestments for A. and his family, as a servant in his house. R. 1 Rol. 4.

But a custom, which restrains trade *sub modo*, may be good; and therefore, the custom of foreign bought and foreign sold, whereby a man, not free of a city, &c. will be restrained from buying or selling goods to other foreigners within such city, &c. is good. Dy. 279. b. R. Jon. 162. Adm. 2 Rol. 202. l. 45.

A custom that none shall use a trade there, unless he be free of the guild. R. in London, 8 Co. 125. Dub. whether good in another city. 1 Sal. 204. Mod. Ca. 21. *Vide By-law, (B 3.—C 3.)*

So, a custom that none shall use the trade of a dyer in such a town, without the licence of the archbishop, will be good. 8 Co. 125.

So, a prescription, that none in the vill of D. who holds of the manor of D., shall bake elsewhere than at such a bakehouse in the same town, will be good. Ow. 67. cont. But it is said that the same case, was R. acc. 8 Co. 125. b. Cro. El. 203. 1 Leo. 142.

A custom that a butcher do not sell flesh in his own house upon a market-day in a town where the prior has a market, but must sell upon a stall in the open market. 8 Co. 127. a.

### (D 3.) By contract.

So, if a man, for good consideration, restrains himself from the exercise of his trade in a particular place, he shall be bound by it; as, if a man, in consideration that the plaintiff would buy all the goods in his shop, promises that he will not afterwards use his trade in the same shop. R. Al. 67. R. Noy. 98. R. 2 Rol. 201.

Or, thaa he will not use his trade afterwards in the same street in London. R. 2 Cro. 597. Per Roll, Sti. 911.

So, in consideration that the plaintiff bought his decayed wares at  
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the first price, he will not use his trade afterwards in the same town in the country. R. per three J. and aff. in error, 2 Cro. 596. 1 Rol. 16. l. 50. Jon. 13. 2 Rol. 201.

So, in consideration that the plaintiff had married his daughter. R. and aff. in error, 1 Rol. 17. l. 67. Sci. 111.

So, in consideration that he took his house for 21 years, that the defendant will not suffer the same trade in the next shop during the term, is good. 2 Cro. 326. 2 Bul. 136.

[So, bond, with condition not to set up trade within half a mile of plaintiff's dwelling-house, or any other that she, or her executors or administrators, shall remove to, to carry on trade of a linen-draper, nor to instruct or assist any other, good; on consideration that plaintiff had taken defendant to instruct and maintain without money. Fort. 297. S. C. affirmed on error in B. R. and in parliament; the twelve judges attending, and unanimous. Str. 739. Ld. Raym. 1456.]

[So, articles not to set up a trade taught, within the bills of mortality, on penalty of 44l., good. B. R. H. 53.]

But a promise or obligation, which binds any to a total restraint of his trade, is unlawful and void. Adm. 2 Cro. 596.

As, an obligation that he will not afterwards use the trade of a dyer. 2 H. 5. 5.

So, an obligation that he will not buy sheeps-trotters of any person, with whom the obligee deals or shall deal, or of more persons than he buys of; for this may amount to a total restraint of his trade. R. in B. R. T. 1 W. & M. Sho. 2.

So, an obligation on promise, which restrains the total use of his trade for four years, will be void.

Though it be only in three counties. Ow. 143.

Or, that he shall not use his trade for four years in Nottingham. R. Mo. 115. Al. 67. R. Ow. 143.

So, an obligation or promise, which restrains the total use of a trade in a particular place, is void, unless it appears to be made upon good consideration. Per Holt. Sho. 2. R. 2 Leo. 210. Mo. 242. 3 Lev. 242. [1 P. Wms. 181.]

So, if it restrains the total use of trade, though it be upon consideration. Al. 67. [1 P. Wms. 181.]

[B. gave a bond to A. that he would not practise as a surgeon on his own account for fourteen years within ten miles of a certain place, in consideration that A. would take him as an assistant in his business as a surgeon for so long a time as it should please A.; and the bond was holden good in law. B. R. H. 33 Geo. 3. 5 T. R. 118.]

#### (D 4.) Monopoly.

By st. 38 Ed. 3. a merchant may freely deal in all manner of merchandize, notwithstanding any charter. 2 Rol. 174. l. 45. 50.

And therefore, every grant of the king, which tends to a monopoly, will be void by the common law. 1 Rol. 4.

A monopoly is, when the sale of any merchandize or commodity is restrained to one or a certain number. 11 Co. 86. b.

And has three inseparable consequents; the increase of the price, the badness of the wares, the impoverishment of others. Ibid.

And therefore, every grant which tends to a monopoly, will be void;  
as,

as, if the king grants to A. the sole making of cards, &c. for twenty-one years. R. 11 Co. 86. 8 Co. 125. a.

On the sole making of ordnance for battery in the time of war. Godb. 254.

That he alone shall carry kersyes out of the kingdom. Godb. 254.

Or, shall have the sole importation of cards into the kingdom. R. 11 Co. 88.

That goods shall not be imported, but at such a port. 2 Inst. 61.

So, by the st. 21 Jac. 2. all monopolies, and all commissions, grants, licences, letters patent, &c. to any person, body politic, &c. for any sole buying, selling, making, working, using of any thing, &c. shall be void.

And any grieved, &c. may have an action on the statute in B. R., C. B., or Exchequer, and recover treble damages and double costs.

So, all monopolies are contrary to magna charta. 2 Inst. 63.

But by a proviso in the st. 21 Jac. 2. it shall not extend to letters patent, &c. heretofore made for twenty-one years, or hereafter to be made for fourteen years, for the sole working or making of any new manufacture, to the first inventor, &c. so as not contrary to law, or mischievous to the state, or generally inconvenient.

And, any grant to a city or corporation, or to any company, &c. of art, occupation, mystery, &c. for the maintenance or ordering of trade; and letters patent made or to be made about printing, making of gunpowder, ordnance, shot, or of any office not decried by proclamation, shall be of the same effect, and no other, as if this act had not been made.

And this act shall not extend to letters patent, grant, &c. about allom, or allom mines, or to the fellowship of hoastmen at Newcastle, about selling, &c. sea-coal or pit-coal, &c. or to licences for keeping taverns, or selling wines, or the patent to Sir Robert Mansell about making glass, or to Abraham Baker about smalt, or Lord Dudley about cast-works.

So, there may be letters patent for fourteen years to the first user within the kingdom, though he did not invent, but discovered it in foreign parts. Per two J. Sal. 447.

Vide ante, (B).

[Chancery governs itself by this rule, whether there is any act of parliament on which the restriction is founded. 2 Atk. 484.]

[Authors (and those claiming under them) have property in their books, after publication, in perpetuity; and they only have a right to multiply copies for sale, and may maintain action against any. This is a common-law right, not taken away by st. 8 Ann. c. 19. Per Mansfield C. J. Aston J. and Willes J. contra Yates J. P. 9 G. 3. 4 B. M. 2303.]

[Writ of error was brought; but plaintiff, after assigning errors, suffered himself to be non-prossed, and injunction in Chancery was granted.]

[The same doctrine was confirmed by decree in Chancery.]

[But on appeal to the House of Lords, this decree was reversed; the doctrine now established is,

[That authors or their assigns have not the sole and exclusive copy-right in perpetuity after having published their compositions; but by st. 8 Ann. c. 19. extended now by 54 G. 3. c. 156, have it for fourteen years from the publication, and then the right returns to the authors (if living) for other fourteen years.]

[*N. B.* Previous to this judgment, the opinions of the judges were taken, and were as follows:

Five judges, viz. Smythe C. B., Aston J., Willes J., Blackstone J., and Ashhurst J. delivered their opinions;

1. That at common law an author had the sole right of first publishing, and might bring action against any who did it without his consent;
2. That the law did not take away such right on his publishing, and that no person may then do it without his consent;
3. But the author and his assigns had the sole right in perpetuity;
4. And that this action at common law is not taken away;
5. Nor this right any way impeached, restrained, or taken away by stat. 8 Ann.

With these five (it is said) Lord Mansfield was known to concur (though he did not speak, it being very unusual, from reasons of delicacy, for a peer to support his own judgment on an appeal to the House of Lords). It may therefore be said, there were six of the twelve judges unanimous on all these points.

Two judges, viz. Gould J. and Nares J. were of the same opinion on the 1st, 2d, and 4th points, as to the common-law right.

One judge, viz. De Grey C. J. was of the same opinion on the first point.

Two judges, viz. Adams B. and Perrott B. were of opinion on the first point, that the author had the sole right of first publishing, but could not bring action against any but such as had obtained the copy by fraud or violence.

One judge, viz. Eyre B. was of a contrary opinion on this 1st point, viz. that the author had no right even before publishing, and in all the rest.

Four, viz. De Grey C. J., Adams B., Perrot B., and Eyre B. were of a contrary opinion on the 2d and 4th points, viz. that publishing took away the right.

And six, viz. De Grey C. J., Adams B., Gould J., Perrot B., Nares J., and Eyre B. were of a contrary opinion on the 3d and 5th points, viz. that the common-law right was taken away by 8 Ann.

[So, that of these six, only two concurred with each other on all the five points, viz. Nares J. and Gould J. on one system, and Adams B. and Perrott B. on another, and the opinions of the six were diversified six several ways.]

[An author whose work is pirated before the expiration of twenty-eight years from the first publication of it, may maintain an action on the case for damages against the offending party, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed. B. R. E. 38 Geo. 3. 7 T. R. 620.]

[An action lies to recover damages for pirating the new corrections and additions to an old work. B. R. E. 41 Geo. 3. 1. East, 358.]

[By st. 15 G. 3. c. 53. the universities in England and Scotland, and Eton, Westminster, and Winchester colleges, may hold in perpetuity their copy-right in books given or bequeathed to them.]

[The proprietor of a print, to entitle himself to the benefit of st.

8 Geo. 2. c. 13. must engrave and print his name, and the day of first publication, on it. P. 10 G. 3. 3 Wils. 60.]

[By st. 17 G. 3. c. 57. proprietors of prints may bring action on the case, and recover damages and double costs, against persons copying their prints in the whole or in part, by varying, adding, or diminishing, without consent.]

[In an action on this statute by the proprietors, against the pirate of a print, it is not necessary to produce the plate in evidence; one of the prints taken from it is sufficient. B. R. M. 33 Geo. 3. 5 T. R. 41.]

[A patent was granted to A. B. for a new invented method of using an old engine in a more beneficial manner than was before known. The specification stated, that the method consisted of certain principles, and described the mode of applying those principles to the purposes of the invention, and an act of parliament, reciting the patent to have been for the making and vending certain engines by him invented, extended to A. B. for a longer term than fourteen years the privilege of making, constructing, and selling the said engines. Qu. Whether under these circumstances, the patent right was valid? C. P. E. 35 Geo. 3. 2 H. Bl. 463. B. R. H. 39 Geo. 3. 8 T. R. 95. determined the patent-right to be valid.]

[Where a monopoly is granted to one or more individuals, they are bound to deal with the public on reasonable terms. 12 East, 527.]

[Vide Patent, (E).]

(D. 5.) Restraint by statute.

[Acts of parliament, relating to trade in general, are public acts; but an act which relates to a certain trade only, is a private one. 1 T. R. 125.]

(D. 5.) If he have not served as an apprentice.

So, by the st. 5 Eliz. 4. none shall use a manual occupation, &c. not then used by him, but then used within the realm, unless he shall be brought up therein seven years, as an apprentice, nor set any to work in such occupation, unless he have been an apprentice, &c. on pain to lose for every default 40s. for every month.

Who are within the statute.

[This st. against exercising trades, without serving apprenticeship, extends to parishes as well as corporations. T. 30 & 31 G. 2. 1 B. M. 366.]

And this statute restrains the use of any trade without being an apprentice for seven years, which was then used, or is mentioned in the statute. 8 Co. 129. b. Sal. 611.

As, a draper. Hard. 54. 2 Keb. 403. R. Sti. 223.

Ironmonger. R. Cro. Car. 316.

Soap-maker. Hard. 54.

Knife-haft-maker. Ibid.

Brewer. R. 8 Co. 129. b. 2 Cro. 178. 1 Rol. 10. Dub. 2 Bal. 190. R. if it be in London. Pal. 543.

Baker. R. Mo. 886. Hob. 183. 2 Rol. 376.

Tailor. D. 1 Lev. 243.

Upholsterer. Dub. 1 Rol. 10. 2 Bul. 191. R. 1 Lev. 243. Sal. 611.

Point-maker. Cro. Car. 516.

Spurrier. R. 2 Cro. 179.

Tiler. 4 Mod. 145.

Fell-monger. Sal. 611.

Barber. R. 1 Lev. 87. 2 Lev. 206.

Cook. 8 Co. 129. b.

[Indictment on this statute against a tanner needs not aver the want of other qualifications, which by subsequent statutes entitle persons to exercise that trade without apprenticeship; but such other qualification must be shewn by defendant, either by plea, or in evidence. 2 B. M. 1035.]

And a person cannot use a trade within the restraint of the statute, to which he does not serve as an apprentice for seven years; though he be a freeman of the city of London. R. 1 Sand. 311.

Though he be an alien or denizen. R. Hut. 132.

Though he have served as an apprentice to another trade. R. Sho. 266. Cont. 4 Leo. 9. 2 Bul. 190.

Though she was a widow to a tradesman within the statute; for that does not make her an apprentice. Noy, 5. Except where she assisted her husband seven years. Carth. 163.

Though he served beyond sea for seven years, if he was not bound by indenture. Per Holt, in Surry, 10 W. 3. Sal. 67. The book seems cont.

Though he allege a custom to excuse him. Dub. Pal. 542.

[But a man may exercise as many trades as he has worked at, or served to, seven years. 2 Wils. 168. 1 Bl. 233.]

So, a person, not apprentice for seven years, cannot employ others who have served seven years, in the exercising of the trade; for that is using of the trade. R. Sho. 241. 3 Mod. 315. Per three J. Dolb. cont. Sal. 610. Carth. 163.

[But one who advances a sum of money in a trade, and becomes a partner, but does not meddle in the manual exercise of it, is not within the statute 5 El.; though he never served any apprenticeship. 2 Wils. 40. 1 Bul. 5.]

Nor, use the trade for himself. Per Holt, Carth. 163. Vide post, (D 6.)

[Where, by the constitution of a corporation, a person who has served a seven years' apprenticeship to a freeman residing in it, is entitled to his freedom; and where, by a bye-law, the indentures must be inrolled by the town-clerk within a limited time, an apprentice, who is bound to a freeman resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures inrolled, nor will B. R. grant a mandamus to the town-clerk for that purpose. 2 T. R. 2.]

[A single act of selling does not make a man a hawker, nor oblige him to have a licence. 1 B. M. 609.]

[One licence is sufficient for a person who travels with several horses, though the intention of the legislature was evidently otherwise; yet, by mistake the word *year* is put for *horse*, and the commissioners have always conformed to it. But note, B. R. would give no opinion thereon. 3 B. M. 1472.]

[The

The linen manufacture of Scotland is the linen manufacture of this kingdom; therefore native of Scotland, wholesale dealer in Scotch linens, is not obliged to take out a licence to carry his linen from town to town, and expose them to sale in a room by wholesale only. 3 B. M. 1314.]

[A journeyman is not liable to the penalty of 5 El. c. 4. 4 B. M. 2449. Qu. Whether the master who employs him is not liable.]

[By 17 G. 3. c. 33. dyers in Middlesex, Essex, Surry, and Kent, may employ journeymen who have not served apprenticeships.]

[By 17 G. 3. c. 55. so may all hatters.]

[By st. 18 G. 2. c. 39. carts in London may be drawn with three horses, and the wheels of six inches broad may be bound with iron, and the name of the owner shall be on every cart, on pain of 40s. on the driver.]

[By 29 G. 3. c. 26. s. 16, 17. no hawker can expose goods to sale in any part of a market-town, but the public market-place. Vide 4 T. R. 273.]

(D 6.) Who not.

[But the st. Eliz. 4. does not extend to employments which do not require skill; as, to a pippin-monger, or coster-monger. R. 2 Bul. 190. 1 Rol. 10. Dub. Sal. 611. 1 Vent. 326. 346. 2 Lev. 206.

Or, a hemp-dresser, wool-comber. R. Cro. Car. 499. Sal. 611.

Gardener. 1 Vent. 326. 2 Bul. 191.

[Nor the employment as a journeyman. 4 Barr. 2449.]

So, he is not within the statute, if he served seven years as an apprentice, though never bound by indenture. Sal. 613.

[Or, if he served part of the time as an apprentice, and the rest as a journeyman. 3 Keb. 400.]

Or served seven years out of the kingdom, if bound by indenture. R. 1 Sal. 67.

If a wife has assisted her husband in his trade seven years, she may use it after his death. Sho. 242.

[Working at a trade for seven years qualifies. 2 Wils. 168.]

[Service by an apprentice with a second master of the same trade, as and by consent of the first, qualifies. 3 T. R. 608.]

[Query, as to a capitalist trading without manual interference. 15 East, 161.]

If the master, to whom the apprentice served, used such trade, though another trade was his principal; as, if a mercer sells hats, his apprentice shall use the trade of an hatter. Sho. 242.

So, it does not extend to him who uses a trade for his private family; as, if he has in his house any one who acts as a brewer, baker, tailor, &c. for his private use. R. 8 Co. 129. b. R. 11 Co. 54. a. Cro. Car. 499. Acc. Carth. 163.

So, the statute does not abrogate the particular custom of a town, &c.; as, that the widow of a trader shall use the trade of her husband, &c. Carth. 163.

(D 7.) Remedy against the offender.

By the st. 5 Eliz. 4. all penalties in that act, not otherwise disposed of, shall be, one moiety to the king, the other to such as will sue for the same

same in the queen's courts of record, or before justices of oyer and terminer, or any other justice, by action of debt, information, or otherwise: and the said justices, or any two, (one being of the quorum), and mayors, &c. of corporations, may hear and determine all offences against the said statute, on an indictment in the sessions of the peace, or an information, &c.

Provided, all amerciaments, fines, forfeitures for any offences in this act, within a city or corporation, shall be levied, &c. by such person within the city, &c. as shall be appointed by the mayor, &c. to the use of the city, &c. in such manner as any other amerciaments, &c. have been used to be levied, &c. by reason of any grant or charter, &c. to the same city, &c.

And therefore an indictment lies for using a trade contrary to the statute.

Or, debt, or information *qui tam*, &c. [Vide Cowp. 369.]

And an indictment or information lies in the sessions of the city, borough, &c. as well as of the county; though by the st. 31 El. 5. suits for using an art wherein not brought up, &c. shall be in the quarter sessions of the peace, or assizes of the county where the offence committed, or leet, &c.; for it is added, and not elsewhere out of the said county. R. 2 Keb. 403. R. Sal. 370. Mod. Ca. 220.

And an information *qui tam*, &c. lies, though the forfeiture be given to the corporation; for that only shall be intended of the king's part. R. Cro. Car. 316.

But debt does not lie upon this statute in the courts of Westminster, unless the offence was in Middlesex. R. Hob. 184. But Mo. 886. reports the same case cont. Semb. acc. Sti. 223. Vide Action upon Statute, (D).

So, the indictment, &c. is not sufficient, if it does not allege that the trade was used, 5 El. R. Pal. 528. Sal. 611. Semb. cont.; for the court may take notice that it is an antient trade. 2 Rol. 376.

If it be a trade named in the st. 5 El. 4. it shall be intended then used, though not so alleged. 4 Mod. 145, 6.

Who may take or shall be bound apprentices, and how punished or discharged, vide in Justices of Peace, (B 53, &c.)

Vide more concerning trade, in Action on the Case for Deceit, (A 7.)—By-Law, (B 3.—C 3.)—London, (N 6, &c.)—Merchant.—Navigation, (I 1, &c.)—Prerogative, (D 38.)—Scotland, (D 7.)

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## TRANSPOSITION OF WORDS.

Vide PAROLS, (A. 21.)

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## TRAVERSE.

Vide INDICTMENT, (L).—JUSTICES OF PEACE, (D 13.)—PLEADER, (G 1, &c. 17, &c.)—PREROGATIVE, (D 83, 84.)—SEWERS, (G).

TREA-

## TREASON.

Vide ADMIRALTY, (E 2.)—COPYHOLD, (M 1.)—FORFEITURE, (B 1, 2, 3.)—JUSTICES, (K 1, &c.—L 1, &c.—N 1.—X 1.—3 Y 4.)—JUSTICES OF PEACE, (B 2.)—PARLIAMENT, (L. 28.)—TESTMOIGNE, (A 3.)—UTLAGARY, (D 1.)

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## TREASURER.

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Treasurer of a county. Vide JUSTICES OF PEACE, (B 70.)

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## TREES.

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## TRESPASS.

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(A) Tres-

(A) **Trespass, what shall be.**

## (A 1.) To goods and chattels.

Trespass is a wrong done to the person, to the goods and chattels, or to the lands and tenements of another man.

Trespass to the person may be by menace, assault, battery, or mayhem. Of which vide in Battery, (A—B—C—D—E).

Or, by false imprisonment. Of which vide in Imprisonment (L 2.)

It will be a trespass done to another, if a man wrongfully takes the goods and chattels of another; as, if he takes his horse, ox, or other cattle, or live chattel. F. N. B. 87. M.

[Trespass lies for assaulting, beating, and wounding plaintiff's mare. Barnes, 452.]

So, if he takes his furniture, or other dead chattel.

As it lies *de navi abducta*. F. N. B. 87. I.

So, if he takes cattle or goods that belong or have relation to another thing; as, it lies *de pullis espervor. suorum in tali bosco suo nidifican*. F. N. B. 86. L.

Of doves taken out of his dove-house. F. N. B. 88. I.

*De leporibus, phasianis, perdicibus, cuniculis, &c. in warrenna, vel clauso suo captis et asportatis*. F. N. B. 86 M. 87. A.

*De feris in parco suo captis et asportatis*. F. N. B. 87. A.

But this seems to be by the st. W. 1. 20. 2 Rol. 550. l. 46.

Of fish taken. 5 Co. 34. a. Playter.

So, it lies *de uxore abducta cum bonis viri*. F. N. B. 89. O.

Of a servant taken away, *cum bonis magistri*. 2 Rol. 551. l. 34.

So, it lies of charters taken, though they concern the freehold or inheritance.

Of a bond or other writing taken. 2 Rol. 557. l. 40.

So, it lies of 100 shillings of his money *in pecunia numerata*. F. N. B. 87. M.

Of timber. F. N. B. 87. D.

So, *de catallis felon*. taken by the sheriff. F. N. B. 91. F.

Of goods wrecked taken before seizure. F. N. B. 91. D.

Of goods waived or strayed, before seizure. F. N. B. 91. B.

[So, working an estray, although the original taking was lawful. B. R. M. 26 Geo. 3. 1 T. R. 12.]

So, trespass lies for an unlawful distress of goods. F. N. B. 90. B.

For goods taken till he make fine, release, &c. F. N. B. 87. C.

For goods destroyed; as, a mill-stone broken. F. N. B. 88. L.

Sheep driven by a dog, *ita quod deteriorat. sunt*. F. N. B. 89. L.

Hogs driven *ita quod interierunt*. F. N. B. 89. L.

Of hay or other goods burnt. F. N. B. 88. N.

Vestment spoiled by throwing wine upon it. R. Noy, 48.

## (A 2.) To lands and tenements.

It will be a trespass, if a man wrongfully enters the house, lands, or tenements of another without his consent; and therefore trespass lies *de domo sua fracta*. F. N. B. 87. D.

For

For entering *messuagium sive tenementum*. Str. 891.

*De clauso suo fracto*. F. N. B. 88. K. 91. I.

So, a trespass may be to lands or tenements by entry into his possession. F. N. B. 92. A. B. 2 Rol. 555. X.

By treading down, spoiling, eating, &c. his hay or corn. F. N. B. 87. G. 88. K.

By cutting down trees, &c. F. N. B. 87. G.

By hunting in his close. F. N. B. 87. A.

By breaking ditches or hedges. F. N. B. 90. K.

By throwing down or disturbing the setting up of his fold. F. N. B. 91. H.

By breaking up a pond. F. N. B. 87. L.

So, if a man enters and does damage to another, though he does not keep the possession; as, trespass lies *quare domum vel clausum fregit*.

So, trespass lies for a wrong to lands contrary to a trust reposed in him; as, if a lessee at will cuts down timber, or commits voluntary waste. Co. L. 57. a. R. Sav. 84.

So, trespass lies for a wrong to his liberty or privilege in land; as, *quare warrennam ipsius A. intravit, & sine licentia fugavit, et lepores, cuniculos, phasianos, seu perdices cepit et asportavit*. F. N. B. 86. M.

*Quod separalem vel liberam piscariam suam fregit, et piscatus est, &c.* R. Skin. 342. 4 Mod. 186. F. N. B. 87. G. Vide Piscary, (A).

[If a person keeps goods distrained in the house longer than the time directed, he is a trespasser for the rest of the time. Str. 717. Ld. Raym. 1424.]

[Trespass lies against a landlord, who on making a distress for rent, turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress. B. R. H. 41. Geo. 3. 1 East, 139.]

### (A 3.) General wrong.

So, trespass lies for a general wrong to another; as, if a man takes the servant of another out of his service, and keeps him. R. 2 Rol. 556. l. 15. F. N. B. 91. I.

If A. rescues a man out of the hands of an officer who arrested him for me; for he was my servant for such purpose. R. 2 Rol. 556. l. 25. Hob. 180.

If he builds a tolbooth upon my land, without saying, *clausum fregit*. R. 2 Cro. 122.

So, if a miller takes toll of him, who ought to be free of toll; for it is tantamount to having taken his corn. 2 Rol. 556. l. 10.

If he beats the servant of him who ought to have toll, and obstructs his taking of toll. R. 2 Cro. 122.

So, trespass lies for taking a son and heir and marrying him, or a daughter and heiress. F. N. B. 90. H.

Of a canon or monk out of a religious house. F. N. B. 90. G.

Of a prisoner taken in war, or of a villein. F. N. B. 88. A. 91. E.

## (B) By whom it lies.

(B 1.) Trespass *quare clausum fregit*.

Trespass, *quare domum*, or *clausum fregit*, lies by him who has the possession of an estate of freehold or inheritance, or by lease for years, or at will. 2 Rol. 551. l. 47. 54. Vide post, (C 1.—D).

So, tenant at will may have trespass against him who ousts him. Semb. 2 Rol. 551. l. 45.

So, tenant by sufferance may maintain trespass against a stranger. 2 Rol. 551. l. 42.

[By the owner of the soil, for erecting a stall in a market. Str. 1238. Wilson, 107.]

So, it lies by him who has only *vesturam terræ*. Co. L. 4. b. R. Mo. 302.

[A. demised to B. the milk of twenty-two cows to be provided by A., and to be fed at A.'s expence on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be depastured there: it was holden that the separate herbage and feeding of those closes passed to B., and that B. might maintain trespass against any one infringing his right. B. R. T. 5 T. R. 329.]

Or, *herbagium terræ*. Co. L. 4. b. 2 Rol. 549. l. 20. Dy. 285. Cont. 3 Leo. 213. R. acc. Cro. El. 421.

So, by a lessee of the pasture of such a close. R. 2 Rol. 549. l. 25. Mo. 302.

By a grantee of underwood, though the soil does not thereby pass, R. Cro. El. 413. Mo. 355.

By a grantee or lessee of the king *de exitibus* of one outlawed. 3 Leo. 213. Mo. 302.

But a commoner shall not have trespass *quare clausum fregit*. Cro. El. 421.

Nor, he who has a warren in land. Ibid.

[But it lies by a freehold-tenant in a manor, for digging turf in his turbarry, where he has an exclusive right to the turf, though not to the feeding on it; not if he had only common of turbarry. 3 B. M. 1824.]

[An entry by the sheriff under a *fi. fa.*; sale of goods; and keeping possession till after the return of the writ, is one trespass only. 1 Mars. 17. 5 Taunt, 198.]

## (B 2.) What shall be a sufficient possession.

If a man has possession only as lessee for years, or at will, it is sufficient to maintain trespass against a wrong-doer. 2 Rol. 551. l. 47. 54. Vide ante, (B 1.)

[Bare possession is sufficient to maintain trespass. 1 East, 244. 4 Taunt, 547.]

So, if a stranger does a trespass to a lessee at will, which prejudices the land, the lessor may have trespass against him for the damage to the land; for the possession of the lessee is his possession. 2 Rol. 551. l. 49.

So, if a lessee at will commits voluntary waste, the lessor may maintain

tain trespass against him ; for that amounts to a determination of the will. Co. L. 57. a. 1 Rol. 860. l. 50.

If he dies, and his heir enters, the lessor shall have trespass against him before entry. Co. L. 62. b. Cart. 56, 7.

So, a copyholder who is only tenant at will, shall have trespass for trees cut upon his land. 2 Rol. 551. l. 50.

So, an intruder upon the king's possession may maintain trespass. AL. 7.

So, a disseisee shall have trespass against a disseisor, without re-entry, for the first entry ; for the disseisee was then in possession. 2 Rol. 553. l. 50. Co. L. 257. a.

So, if his estate determines, whereby he cannot re-enter ; as, if he was tenant *pur autre vie*, &c. he shall have trespass for the whole time with a *continuando* against the disseisor. 2 Rol. 550. l. 15. 20.

So, if a disseisee re-enters, he shall afterwards have trespass against the disseisor with a *continuando* for the whole time of his possession. 2 Rol. 550. l. 10. 554. l. 35. Co. L. 257. a.

Or, against a stranger for a trespass done during the disseisin ; for by re-entry he revests the possession in himself *ab initio*. 2 Rol. 554. l. 39.

So, against a lessee, donee, or feoffee of the disseisor. R. 2 Rol. 554. l. 45. Cont. 11 Co. 51. R. Mo. 461.

[One in possession of glebe land under a lease void by the st. 5 Eliz. c. 20. by reason of the rector's non residence, may maintain trespass against a wrong-doer. B. R. H. 1 East. 244.]

If a man sells his land, he shall have trespass for a wrong done before. 2 Rol. 569. l. 20.

### (B 3.) What not.

But a plaintiff cannot maintain trespass *quare clausum fregit*, if he has not actual possession ; though he has the freehold in law ; as, an heir shall not have trespass against an abator. 2 Rol. 553. l. 45.

[Or, unless he has the exclusive possession ; and therefore it will not lie for entering into a pew ; because the possession of the church is in the parson. 1 T. R. 430.]

If a wife, tenant for life, leases for years and dies, the reversioner shall not have trespass against the lessee before entry.

Nor, the heir, if an husband, seised in right of his wife, leases, and then the wife dies. 2 Rol. 552. l. 3.

So, if the heir enters upon an abator, he shall not have trespass against him, for the wrong before. 2 Rol. 554. l. 17.

So, a disseisee shall not have trespass against a disseisor for the continuance in possession, before his re-entry, except when his estate is determined, so that he cannot re-enter. 2 Rol. 550. l. 7. 553. l. 52.

Though his entry be tolled by his own act. 2 Rol. 550. l. 25. 30.

So, before re-entry a disseisee shall not have trespass against A. for a wrong done after the disseisin. 2 Rol. 554. l. 2.

So, a bargainee shall not have trespass before entry, though the possession is transferred to him by the statute. Cart. 66.

### (B 4.) What

## (B 4.) What sufficient for goods.

So, not only he who has the property, but also he who has the possession of goods, shall maintain trespass for the goods; as, if a man has cattle to agist, he shall have trespass against him who takes them. 2 Rol. 551. l. 25.

[Possession, either in fact or in law, is essential. 1 T. R. 475.]

So, a lessee of cattle for a year, for composting his land, shall have trespass against a stranger. 2 Rol. 551. l. 20.

Or, against the lessor himself, if he takes the cattle within the year. 2 Rol. 551. l. 22.

So, a bailee of goods awarded. 2 Rol. 551. l. 31.

So, a bailee of goods pledged to him, if a stranger takes them. 20 H. 7. l. a.

So, if a stray in the manor of B. be taken within a year, by a stranger, B. shall have trespass. 20 H. 7. 1.

So, if a man takes the goods of B. who afterwards grants them to another, yet B. after the grant, shall have trespass for them. 2 Rol. 557. l. 52.

[To entitle a man to bring trespass, he must, at the time when the act was done, which constitutes the trespass, either have the actual possession in him, of the thing which is the object of the trespass; or he must have a constructive possession in respect of the right being actually vested in him; as, in the case of an estray or wreck, before seizure by the lord. 1 T. R. 480.]

[So, the executor has a constructive possession from the testator's death. Ibid.]

[But trespass will not lie, by the assignees of a bankrupt, against a sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, and after a provisional assignment, and notice from the provisional assignees not to sell. Id. 475.]

[A. having let his house ready furnished to B., cannot maintain trespass against the sheriff for taking the furniture under an execution against B.; though notice were given that the goods belonged to A., A. not having the possession, trover was the proper action. B. R. M. 4 T. R. 489.]

If a man sells goods at London to A. in York, A. shall have trespass before actual taking; for the possession is immediately in him. Latch, 214.

So, an executor shall have trespass for the goods of his testator, though he does not say that they were taken out of his custody; for the possession upon the death of his testator is vested in him. Per two J. 2 Cro. 113.

So, trespass lies for goods taken after delivery by replevin. 2 Rol. 569. l. 17.

Or, after retaking by the owner. 2 Rol. 569. l. 25.

Or, after his lease, or interest, determined. 2 Rol. 569. l. 30.

If trespass be done to goods in the hands of a bailee, trespass lies by the bailee. 2 Rol. 551. l. 31.

And

And also by the bailor, and he, who first recovers, shall have the damages. 2 Rol. 569. l. 22.

So, trespass lies by a sheriff for taking goods in his hands upon execution before sale.

Though the taking be by the defendant himself against whom the execution was. R. Cro. El. 639.

So, trespass lies for the master of a ship, who had the possession and was taken for the voyage, for a detainer of it. R. 1 Sal. 11.

So, trespass lies for goods taken; though they are afterwards altered in form.

### (B 5.) General trespass; by whom it lies.

So, trespass lies by the party to whom the wrong is done.

[Trespass and false imprisonment lies in England, by a native of Minorca against the governor of that island, for an injury of that nature committed there. Cowp. 476.]

[So, by one hurt by the accidental going off of a gun. T. 10 Geo. Str. 596.]

Though the damage to him be only by consequence; as, it lies by an husband alone for the battery or threatening of his wife, *per quod consortium amisit*, or *negotia infecta reman.*, &c. Vide in Battery, (A).

[So, A. throws a squib among the people at a market, it lights near B. who throws it from him, C. does the same, and it strikes D. and puts out his eye. D. has trespass *vi et armis* against A. Blackstone J. contra. 3 Wils. 403. 2 Bl. 892.]

[Trespass *vi et armis* lies against a defendant for driving his cart so furiously, that it was driven with great force against the plaintiff's carriage, and overturned and damaged it. B. R. T. 5 T. R. 648.]

[Trespass, and not case, lies for a servant's wilfully driving against and injuring another's carriage. B. R. M. 6 T. R. 125.]

[An action on the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff's carriage by the servant of the defendant's negligently driving his master's carriage against it. C. P. 2 H. Bl. 442.]

[If A. wilfully run his vessel against B.'s, and damage ensue, B. may bring trespass; but if A. so negligently steer his vessel that it runs foul of B.'s, then case is the proper action. B. R. 8 T. R. 188.]

[A. declared in case against B. for sinking his boat, and after averring a non-feasance in B. as the cause, stated him to have acted with great force and violence in accomplishing the injury; A. recovered, and on error brought because the action should have been trespass and not case, and because the two actions were mixed, the court referred the concluding expressions to the non-feasance first stated, and held the declaration sufficient to support the judgment. Ex. Ch. 1 Bos. & Pull. 472.]

[A master is not liable in trespass for the wilful act of his servant, the trespass being the servant's, and not the master's. B. R. M. 1 East, 106.]

[Where one accidentally drove his carriage against another's, the remedy is trespass and not case, the injury being immediate from the act done. B. R. E. 3 East, 593.]

So,

So, it lies for the battery of a servant, *per quod servitium amisit*.

So, it lies by a master for the battery of his servant, *per quod*, &c. after the death of the servant. 2 Rol. 568. l. 42.

By an husband after the death of his wife, for taking away his wife with the goods of her husband. 2 Rol. 569. l. 12.

Or, after a divorce. 2 Rol. 569. l. 10.

[It lies for procuring by awe, fear, and influence, contrary to his own inclination, a sovereign, independent, and absolute foreign prince, to imprison the plaintiff. 2 Bl. 1055.]

[By a woman for an assault by defendant to whom she was married, if she proves a former marriage to one alive at the time of second marriage. Str. 79.]

So, by the st. 4 Ed. 3. 7. an executor or administrator shall have trespass for a prejudice to the property of the testator. Vide in Administration, (B 13.)

And by the st. 25 Ed. 3. 5. the executor of an executor.

But trespass does not lie for a battery, &c. to the person of a testator, by his executor or administrator. Vide Administration, (B 13.)

Nor, by an husband after the death of his wife, for a battery to the wife; for she must join. 2 Rol. 568. l. 50.

Nor, by a father for the battery of his son, Cro. El. 55. R. Ray. 259. Mont. Atkins cont.

Or, the imprisonment of a son or daughter. R. Cro. El. 770.

[Where a justice of the peace maliciously grants a warrant against another, without any information, upon a supposed charge of felony, trespass lies against him. B. R. H. 2 T. R. 225.]

[And trespass is the only remedy. Ibid.]

[If A., having been robbed, suspect B. to be guilty, and take and deliver him into the charge of a constable present, B., if innocent, may maintain trespass against A. B. R. T. 6 T. R. 315. Vide supra, Imprisonment, (H 8.)]

Nor, for taking away any son or daughter, who is not an heir. R. Cro. El. 770. Vide in Guardian, (H 5.)

So, if a wrong be done to several at the same time, trespass lies for each severally, for the wrong to him; for trespass is several in its nature. 3 Lev. 354.

[In trespasses, not only he who does the act, but he who commands or procures the doing of it, or aids or assists in it, is a principal. D. Bl. 868.]

[Thus an attorney who sues out irregular process, and delivers it to an officer for execution, is a principal trespasser. Bl. 866.]

### (C) Against whom it lies.

#### (C 1.) Trespass *quare clausum fregit*.

Trespass lies against him who does the trespass, and all aiding, &c.; for there is no accessory, but all are principals in trespass.

So, trespass lies against each severally, where many do a trespass; for it is joint and several in its nature.

So,

- So, against A. *simul cum diversis aliis ignotiis*. R. 1 Leo. 41.  
 Or, against A. *simul cum* B. and C. R. cont. by common law; but it shall be aided as form after a verdict. 1 Leo. 411. 3 Leo. 77.  
 So, against all who procure or command it. 4 Inst. 317.  
 Or, against him who afterwards assents to a trespass done for his use or benefit, though not privy at the time of doing it. 4 Inst. 317.  
 So, if he assents to the act of his servant in seizing goods, he will be a trespasser for misusing of the goods in seizure, though not privy to the misusage. R. Lane, 90.  
 So, trespass, for a battery in ravishing his wife, lies against the wife and others; for she may be assenting. 2 Rol. 553. l. 85. Bro. Rape, 2.  
 So, it lies against A., who comes in aid of B., though he does nothing. 2 Rol. 555. l. 7.  
 Or, if he commands B. to do, though he be not present. 2 Rol. 555. l. 10.  
 So, trespass lies against A. if his wife puts his cattle into the land of another. 2 Rol. 553. l. 30.  
 If the sheriff, by his order, takes in execution the goods of a stranger. 2 Rol. 553. l. 5. 10.  
 But if a servant puts the cattle of his master, without his privy, into the land of another, trespass lies against the servant, and not against the master. 2 Rol. 553. l. 25.  
 If the bailiff of a franchise takes the goods of a stranger in execution, trespass lies against him, not against the sheriff. 2 Rol. 552. l. 40.  
 So, if the bailiff of a sheriff detains in custody after a *supersedeas*, trespass lies against him, and not against the sheriff. R. 2 Rol. 552. l. 45.  
 [But trespass will lie against the sheriff, if his officer take the goods of A. on a *f. fa.* against those of B. Doug. 40.]  
 So, if the sheriff takes a furnace, &c. fixed to the freehold, trespass lies against him, but not against the party, though it is delivered to him. R. 2 Rol. 556. l. 50.  
 So, if the sheriff does not return his writ, &c. trespass lies against him, but not against the party, or bailiff. Vide Return, (F 1.)  
 So, if a man receives him who has done a trespass, knowing him to have done so, he is no trespasser.  
 If a man commits a trespass by mistake, or inadvertency, trespass lies against him; as, if a sheriff or bailiff takes the goods of one instead of another. 2 Rol. 552. l. 17. 22.  
 Or, arrests A. instead of B. 2 Rol. 552. l. 25.  
 Or, attaches A. by the goods of B. or of his master. 2 Rol. 552. l. 20.  
 Though it be by the shewing of the party to the suit. 2 Rol. 552. l. 30.  
 If an executor capcels an obligation of his testator to A. which he finds, supposing that it is cancelled. R. 2 Rol. 563. l. 45.  
 If a man's cattle escape into the land of another, against his will. 2 Rol. 568. l. 15.  
 So, if the cattle of him in reversion after the death of *cestuique vie*, &c. trespass on the corn of tenant for life against the will of the owner. R. 2 Rol. 568. l. 20.

So, trespass lies against A., if cattle in his custody do a trespass. 2 Rol. 546. l. 20.

Or, against the owner of the cattle at election. 2 Rol. 546. l. 20.

[Trespass lies against tenant in possession, after judgment against the casual ejector for the meane profits, from the time he has notice of lessor's title, though he lets judgment go by default, and his name does not appear in the record of judgment against casual ejector. R. by all the judges, 2 Wilt. 115.]

[If a man has apprentices, and puts them in custody in a lock-up-house, and they complain to quarter-sessions of being ill used, &c. and their fear of being sold to Guinea, and the court discharges them, W. lieutenant of a man of war agrees with them to serve, and gives A. money to keep them that night, and next morning sends press-gang for them, with a note to A. to deliver them, which he does, taking a receipt; trespass *vi et armis* lies against W. for he sent force. 3 B. M. 1306.]

But trespass does not lie against a man not consenting or aiding to it; as, if A. strikes an horse upon which B. is riding, whereby he throws down another, trespass does not lie against B. Sal. 637, 8.

[So, trespass does not lie against a pound-keeper merely for receiving cattle, though the taking was tortious; for he is bound to keep whatever is brought to him. Otherwise, if he go beyond his duty, and assent to the trespass. Cowp. 476.]

So, trespass does not lie against a lord, because his distress is unreasonable, or carried into another county; for by the st. Marl. 4. *Non puniatur per redemptionem*; but there shall be an action upon that statute. 2 Inst. 105, 106.

Nor, by the equity of the statute by a lessee for years against the lessor. 20 Ed. 4. 2, 3. R. Dal. 3.

Yet, it lies, if the lessor spoils, or destroys the goods. 20 Ed. 4. 8. a.

[The court will not join declarations against separate persons, on an affidavit that the trespass, if any, was committed by all jointly; for that would deprive the plaintiff of the benefit of the evidence of one against the other. Str. 420.]

(C 2.) What act makes a man a trespasser *ab initio*.

So, if a man has an authority or licence given him by law, and he abuses it by misfeasance, he shall be a trespasser *ab initio*; as, if a man who takes a distress, works, or kills it. 8 Co. 146. Vide in Distress, (D 6.)

[If an officer attach goods, and continue possession of the house, or keep the goods therein for a long and unreasonable time, without removing them to a place for safe custody, he is a trespasser *ab initio*. 2 Bl. 1218.]

If a lessor, who enters to view if waste be done, damages the house. 2 Rol. 561. l. 27.

Or, stays there all night. 2 Rol. 561. l. 27.

[Party distraining, not a trespasser *ab initio*, by reason of subsequent irregularity.]

If a commoner enters to view his cattle, and cuts down trees, &c. 8 Co. 146. b.

If a purveyor, who takes my cattle for the king's house, sells them. 2 Rol. 561. l. 29.

If a searcher unpacks stuffs, and puts them in the dirt, whereby they are damaged. R. 2 Rol. 561. l. 30. Lane, 90.

So, if his servant, or assistant, does it, without his direction. 2 Rol. 563. l. 5. Lane, 90.

If a man enters a tavern, and continues there all night against the will of the taverner. 2 Rol. 561. l. 35.

If a man will impark goods distrained after amends tendered. 2 Rol. 561. l. 45. Semb. cont. 8 Co. 146. b.

[If a man converts a hog taken damage-feasant. 3 Wils. 20.]

If the lord of a manor works a stray within the year. R. 2 Rol. 562. l. 15. Vide in Waife, (F).

[Although the original taken be admitted to be lawful. 1 T. R. 12.]

Or, the lord of a fair or market works a horse distrained for toll. 2 Rol. 562. l. 30.

So, if the bailiffs of a town who by custom seize an hide, for non-payment of a customary duty for hides of all oxen killed and sold within the town, tan it, to prevent putrefaction. R. 2 Rol. 562. l. 25.

So, if the sheriff does not return a writ where he ought, or makes a false return. 2 Rol. 563. l. 15. 20. Vide in Return, (F 1, &c.)

If a sheriff, or any in his aid, makes replevin after a claim of property notified to him by the owner. R. Mod. Ca. 68. 139.

If an escheator takes the goods of one outlawed after a writ *de non molestando* shewn to him. 9 H. 7. 1.

So, if a man abuses a trust or confidence reposed in him, he will be a trespasser *ab initio*; as, if lessee at will commits voluntary waste, by throwing down a house, cutting down trees, &c. Co. L. 57. a. 5 Co. 13. b. 2 Rol. 555. l. ult. R. Mo. 248.

If a shepherd kills sheep committed to his care. Co. L. 57.

Or, for a special purpose; as to plough or dung his land. 2 Rol. 558. l. 5.

If a servant, or assistant, intrusted to sell goods in a shop, embezzles them to his own use. R. 1 Leo. 87. R. Mo. 248.

So, if a man has colour of an authority, and afterwards it is vacated and declared to be null, he will be a trespasser *ab initio*; as if a man obtains judgment irregularly, and afterwards takes out execution, the party (though not the officer) will be a trespasser, if the judgment be vacated. R. 1 Lev. 95. but Twisd. dub.

So, if a man has an authority given by statute, and does not pursue, or abuses his power; as, if a man having authority by the st. 2 W. & M. to sell a distress for rent, if it be not replevied within five days after notice, &c. sells it without notice given. Adm. 4 Mod. 391.

[If a man puts cattle, which he impounded damage-feasant, into the next pound which happens to be in another county, it does not make him a trespasser, but he is subject to the penalty of st. 1 & 2 P. & M. c. 12. Str. 1272.]

[Beasts dying after put in the pound, does not make a man trespasser *ab initio*; but case will lie. 2 Wils. 313.]

## (D) When trespass does not lie.

[Trespass does not lie for a non-feazance. D. Ld. R. 188.]

[As for not removing tithes. D. Ld. R. 188.]

But a man shall not be charged in trespass for goods which he had by the delivery of the party himself, except where by a wrongful act he makes himself a trespasser *ab initio*; as, if A. delivers goods to B. for custody, who afterwards will not re-deliver them, trespass does not lie against B. 2 Rol. 555. l. 27. 40.

[Trespass does not lie where an inclosure act gave the commissioners power to set out and make roads, &c. and directed that the expences of making and repairing those roads and all other expences, should be borne by the proprietors in certain proportions, to be ascertained by the commissioners in one general rate; and then gave an appeal to the sessions where the parties thought themselves aggrieved; but the party thinking himself aggrieved must appeal to the sessions. B. R. E. 5 T. R. 182.]

So, if A. permits his goods to remain with B. for his own use, and B. delivers them to C. to carry to another place, trespass does not lie by A. against C. 2 Rol. 555. l. 35.

Nor, for goods which come to him by authority in law. 2 Rol. 555. l. 43. Vide ante, (C 2.)

As if A. takes goods by delivery of the sheriff upon a replevin. 2 Rol. 555. l. 45. 565. l. 45.

Or, takes them upon an execution, though it be not regularly made. 2 Rol. 556. l. 50.

Upon a sale. R. 2 Rol. 556. l. 52.

If a constable takes goods waived for the use of the owner, though he afterwards refuses to deliver them to him, trespass does not lie, but detainue. R. 2 Rol. 555. l. 50. 561. l. 40.

Nor, for goods which a man takes only for security for the use of the owner; as, if goods are thrown by tempest into the sea, and a stranger takes them, and delivers them to the servant of the owner for him. 2 Rol. 555. l. 47.

So, the master of a barge in a tempest may throw goods into the sea for the safety of the passengers. R. 2 Rol. 567. l. 5.

Nor, for goods which a man has lawfully, though the possession of him from whom he had them was wrongful; as, if A. takes the horse of another and sells him to B., trespass does not lie against B. 2 Rol. 556. l. 52.

So, if a man has licence or authority from the plaintiff himself, trespass does not lie against him, though he abuses his licence by misfeasance. R. 8 Co. 146. b.

So, if a man has licence or authority by law, and afterwards does not do what he ought, trespass does not lie against him; for non-feasance does not make him a trespasser *ab initio*. R. 8 Co. 146. b.

As, if after a distress, the rent or sufficient amends are tendered, trespass does not lie; though the party refuses delivery of the goods distrained. 8 Co. 146. b.

[Trespass does not lie against excise-officers who enter into a person's house by virtue of a legal warrant to search for smuggled goods, though  
none

None be found; but case lies for maliciously obtaining or executing the warrant. 1 T. R. 535.]

[Nor, for taking excessive distress; but a special action on the statute of Marlbridge. Str. 851. 1 B. M. 579.]

[Unless the distress is of gold or silver, which are of a certain known value, and even the measure of the value of other things. Cited supra.]

If a man comes into a tavern, or common inn, and afterwards refuses paying for wine. R. 8 Co. 146. b.

If a sheriff after an arrest refuses bail. R. 2 Rol. 561. l. 50. 562. l. 10. Cro. Car. 196. Vide Bail, (K 6.)

So, trespass *quare clausum fregit*, or general trespass, does not lie where damage is done to a privilege or liberty which a man has in the soil of another; but he may have an action upon the case; as, a commoner shall not have trespass for damage to the soil or grass. Vide in Common, (H—I.)

So, if a man has a free warren in the land of B., he shall not have trespass for that *latibula libera warrenæ suæ prostravit, &c. per quod cuniculi, &c. interierunt*. R. 2 Rol. 550. l. 45.

So, trespass does not lie, where the damage accrues to the goods by his own neglect or default; as, if A. gives licence to B. to put hay, &c. upon his land till it can be sold, and afterwards leases the land to C., trespass does not lie by B. if his hay be consumed by the cattle of C.; for he ought to secure the hay at his peril. R. 2 Rol. 143. 152.

So, trespass does not lie, where the act is not against the peace, or wrongful, but the effect of cunning or contrivance; as, if a man procures the servant of another to go out of his service, and then retains him, but does not take him away. 2 Rol. 556. l. 17.

So, trespass does not lie against the servant, if he departs out of the service of his master. 2 Rol. 556. l. 20.

So, trespass does not lie for a lawful act, though in consequence damage is done to another; as, if a man fixes a spout to his house, which, upon rains, throws water upon the wall of another; but there may be an action upon the case. R. 2 Mod. Ca. 272. [Str. 634. 2 Ld. Raym. 1399. Fort. 212.]

[So, trespass does not lie for an imprisonment which was merely in consequence of the capture of a ship as prize, though the ship shall have been afterwards acquitted. Doug. 594.]

[Trespass does not lie, if a ship be seized, as forfeited by the navigation act 12 Car. 2. c. 18. by a governor of a foreign country belonging to Great Britain, although he has not proceeded to condemnation; for by the forfeiture the property is divested out of the owner. B. R. 5 T. R. 112.]

So, trespass does not lie for an act which is felony; as, for a battery, of which the party dies within a year. 2 Rol. 557. l. 5. Vide Action upon the Case, (B 5.)

For taking goods which was a robbery, if it appears to be a felonious taking. R. 2 Rol. 557. l. 10. 1 Mod. 283.

If it appears upon evidence, or by plea. Semb. 2 Rol. 557. l. 10. 20. R. 1 Mod. 283.

For breaking a house and taking money, for which he was convicted of burglary. Dub. Jon. 148.

But if a man prosecutes for the felony, and the party is acquitted

or burned in the hand, he may have trespass; for he has done what the law required against him for the felony, and then the trespass remains. R. 2 Rol. 557. l. 25. R. Jon. 150.

So, if the defendant pleads a conviction of felony, it is no bar; for the plaintiff was not a party, and therefore not estopped by the record. Semb. 2 Rol. 557. l. 10.

So, if he pleads a conviction uncertainly. R. per three J. Jon. 147. Latch, 145.

So, in trespass for taking goods, if it does not appear by the declaration, &c. that the taking was felonious, the defendant cannot say so. R. 1 Mod. 283.

So, trespass does not lie against a man for taking goods which he found. R. 2 Rol. 555. l. 50.

Unless, after the finding, he embezzles the goods. R. 2 Rol. 563. l. 45.

For throwing down a nuisance. 2 Rol. 565. l. 50.

So, trespass does not lie, if cattle enter the close of another for want of repair of the fences. 2 Rol. 565. l. 30.

If a man enters land to drive back his cattle, escaped thither for want of fences. 2 Rol. 565. l. 35.

Or, to drive back wild beasts, escaped for want of paling against a forest. 2 Rol. 565. l. 40.

Or, to retake his goods, carried thither by the occupier of the land. 2 Rol. 565. l. 54.

But it is not justifiable to enter land with cattle; because it lies open to the highway. 2 Rol. 565. l. 47.

Or, to enter to search for goods stolen, without reason of suspicion that they are there. R. 2 Rol. 565. l. 15.

Or, to enter upon a common report, that his trees dug up are carried thither, that not being felony. R. 2 Rol. 564. l. 30.

Or, to enter for retaking goods, which he, who holds them in common with me, put there; for though a tenant in common may retake goods in common, when the other takes them, yet he cannot justify a trespass to do it. R. 2 Rol. 566. l. 30.

So, if a man imprisons me, of his own wrong, I may justify the breaking of windows or doors to get out; for it was his fault. 2 Rol. 566. l. 5.

If a man, by neglect, suffers his house to be on fire, I may pull it down for the safeguard of mine adjoining. 2 Rol. 566. l. 3.

If a man takes an handful of grain from my heap, I may take as much from his heap. R. 2 Rol. 566. l. 12.

If a man throws his grain or money to my heap, I may take the whole. R. 2 Rol. 566. l. 15.

If cattle or goods are damage feasant, I may drive or remove them out. R. 2 Rol. 566. l. 20. 35. R. 4 Co. 38. b.

But I cannot kill or damage them.

Nor, can I kill a tumbler hunting in my warren. R. 2 Rol. 567. l. 35.

So, if a man sells me all his trees, I shall have liberty to come upon the land, to cut them down, and carry them away when I please. R. 2 Rol. 567. l. 40.

So, a grantee of a water-pipe, &c. shall have liberty to mend it. 2 Rol. 567. l. 45.

An

An executor has liberty to enter to take the timber of the deceased. 2 Rol. 564. l. 25.

A reversioner, &c. to view waste, if he does not break a door or window. 2 Rol. 568. l. 5.

If cattle, in passage on the highway, eat herbs or corn *raptim et sparsim* against the will of the owner, it will excuse the trespass. R. 2 Rol. 556. l. 55.

[But if defendants enter plaintiff's close, where there is no footpath, and adjoining to his paddock, with guns and dogs, dog runs into the paddock and kills a deer; trespass lies, for it cannot be called involuntary. 4 B. M. 2092.]

But trespass is not excused on pretence of charity; as, if a mother enters the house of another, to visit her sick daughter there, without asking leave. R. 2 Rol. 567. l. 15.

Or, on pretence of sport; as, for the hunting of a fox or badger. R. though it be for the public good. 2 Rol. 558. B.

[But a man may justify a trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox. 1 T. R. 334. Vide 3 T. R. 259. n.]

If a man sets a falcon at a pheasant in his own land, he cannot pursue it into the warren of another. 2 Rol. 567. l. 30.

[It does not lie for seizing a house in the East Indies. Str. 646.]

[It lies not for the father, for assaulting and getting with child his daughter, *per quod servitium*, &c.; if she was of age and away from her father's house, in service; but if she was under age, and under her father's roof, it lies. 3 B. M. 1878.]

[It lies where the daughter resides with her father, though she be above twenty-one years of age, and though no contract of service be proved, if act of service be really proved. 2 T. R. 166.]

[Trespass will not lie against the sheriff or his officer for arresting a certificated bankrupt, a peer, a discharged insolvent, &c. Doug. 671.]

### [(E) Costs, &c.]

[In trespass cl. fr. two defendants suffered judgment by default, and the third had a verdict. Damages being assessed against the two former, a rule was granted for deducting the costs and damages taxed and assessed on the judgment by default, out of the costs taxed on the *postea*, for the defendant who obtained the verdict; on an affidavit, that the defendants who suffered the judgment by default, had acted under the authority of the other defendant, who had undertaken to pay the damages and costs. 1 H. Bl. 23.]

[The stat. 4 & 5 W. & M. c. 23. s. 10. only applies where the special circumstances alleged to bring the case within it are proved. 2 Blk. 900.]

[Where there are no grounds for vindictive damages, proceedings will be stayed on restoring the goods, or paying their value, with the costs. 7 T. R. 53. Secus, where this will not end the suit, or the value is not admitted. 3 Anst. 896.]

Vide more concerning Trespass, in Action on the Case, (B 6.)—Damages, (M 12.)—Justices of Peace, (B 11.)—Pleader, (3 M 1, &c.)

## TRIABLE PLEA.

Vide PLEADER, (E 34.—G 7.)

## TRIABLE ISSUE.

Vide PLEADER, (R 10.)

## TRIAL.

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(A) The

(A) The several sorts of trial.

When trial shall be by the country, vide in Enquest, (A 1, &c.)

The antiquity, number, qualification, exemption, and challenge of jurors, vide in Challenge, (A 1, &c.)

What process there shall be against jurors, vide in Enquest, (C 1, &c.)

When trial shall be by certificate of the ordinary, recorder, marshal, &c. vide in Certificate.

Trial of a peer shall be by his peers. Of which vide Parliament, (L. 16. 26.)

Of peerage, whether he be a baron or not, shall be tried by the writ of summons to parliament. Vide in Dignity, (D).

Trial of ancient demesne shall be by doomsday book. Vide in Ancient Demesne, (F 7.)

(A 1.) By record.

A matter of record is of so high a nature, that it shall be tried only by itself. 9 Co. 25. a. 31. a. 2 Rol. 574. l. 7.

And therefore, if to a judgment, statute, or recognizance, alleged in pleading, *nul tiel record* be pleaded, it shall be tried by the record itself. 2 Rol. 574. l. 17. 50. Vide in Record, (B).

So, to a recovery or fine. Pl. Com. 15. a.

So, to an indictment, or acquittal upon it. 2 Rol. 574. l. 11.

So, if the issue be, whether the plaintiff be an alien enemy, it shall be tried by the league, which ought to be upon record. 9 Co. 31. a. 2 Rol. 575. l. 50.

Whether a protection was allowed in court. 2 Rol. 574. l. 15.

Whether the defendant was committed to prison. 2 Rol. 574. l. 20.

So, in an action for an escape after a *cepi corpus* returned, if the issue be, whether he was in custody of the sheriff. 2 Rol. 574. l. 24.

Whether he was in execution for such a cause. 2 Rol. 574. l. 20.

Whether he be rendered in execution in discharge of his bail. 2 Rol. 576. l. 5.

Whether such an one was a justice of peace. 2 Rol. 574. l. 30.

Or, sheriff. 2 Rol. 575. l. 25. 32 H. 6. 27.

So, whether he was sheriff on such a day; for the letters patent shew when he was made sheriff; and he continues so, till discharged by matter of record. R. 2 Rol. 575. l. 30.

Whether he was a baron, earl, &c. 2 Rol. 575. l. 5. Vide in Dignity, (D—F 1, 2.)

[Whether a man is an attorney. Str. 76.]

What is matter of record, vide in Record (A).

What will be a material variance, what not, vide in Record, (C).

(B.) Trial by the Justices.

(B 1.) By Inspection.—When it shall be.

If there be a question, whether a fine, statute, recognizance, or other matter acknowledged before a judge of record, was done by an infant or not? it shall be tried by inspection of the justices, for an act done by

by a judge of record shall never be tried by the country. 9 Co. 30. b.

And therefore, in error by an infant to reverse a fine levied during his nonage, if there be issue upon it, it shall be tried by inspection. 9 Co. 30. b. R. 2 Rol. 572. l. 10.

So, in an *audita querela*, to be relieved against a statute or recognizance acknowledged in his nonage. 9 Co. 30. b. R. 2 Rol. 572. l. 25. 573. l. 50. Yel. 88. 3 Mod. 229.

∴ So, in error to reverse a recovery against him by default. 2 Inst. 483, 484.

So, in an appeal by an infant, if there be issue upon the infancy, it shall be tried by inspection. 2 Rol. 572. l. 21.

So, in account by or against an infant. 2 Rol. 572. l. 30.

So, if tenant, by receipt, *aide prier*, or *vouchee*, pray, that the parol may demur for his nonage, it shall be tried by inspection. 2 Rol. 572. l. 12. 32. 9 Co. 31. a.

If judgment be for the infant, upon inspection in an *audita querela*, and afterwards reversed by error in B. R., and then another *audita querela* brought in B. R., there must be a new inspection; for an inspection in one court is not sufficient for another. B. Yel. 88.

So, though the new *audita querela* be in C. B., where the former inspection was. Ibid.

Yet if he be of full age before the second *audita querela*, he may be relieved upon an allegation of the former inspection, and the judgment for him, and the reversal. R. 2 Cro. 59.

#### (B 2.) When not.

But if nonage be confessed, no inspection is necessary; for the party has the effect of the plea. 2 Rol. 572. l. 35.

So, if an infant, after full age, would avoid an act done by him for his nonage, it shall be tried by the country, for inspection will be of no effect; as, if there be error to reverse a judgment, because that he, being an infant, appeared by attorney, it shall be tried by the country, whether he was an infant. 9 Co. 30. b. 2 Rol. 573. l. 15.

Or, to reverse a common recovery, suffered by him within age (admitting it to be error). 2 Rol. 573. l. 45.

So, in account, if the defendant pleads infancy at the time of bailment. 2 Rol. 572. l. 40.

So, though he be an infant at the time of error sued; for judgment shall be reversed, as well when of full age, as when an infant. R. 2 Rol. 573. l. 25. 45.

So, in all cases where infancy is triable by inspection, if there be a doubt, the Court may direct a trial by the country. 2 Rol. 573. l. 35.

#### (B 3.) How tried.

If a trial by inspection be required, and the infant is not in court, a *venire* shall be awarded against him; as, if the voucher of an infant be counterpleaded. 2 Rol. 573. l. 12.

So, if it be prayed in aid of an infant. 9 Co. 31. a.

But if he pleads infancy by his guardian, the guardian shall be commanded

manded to have the infant in court at the day to be inspected, without a *venire facias*. 2 Rol. 573. l. 10.

If the court be in doubt upon inspection, they may inform themselves by proofs ; as, by examination of the mother, godfather, &c. 2 Rol. 573. l. 5. Pal. 326.

So, they may examine the infant himself upon a *voyer dire*. 2 Rol. 573. l. 3.

(B 4.) By examination without inspection.

So, the customs and usages of a court shall be tried by the justices of the same court. 9 Co. 30. b.

So, if A. makes an attorney in court, and the defendant pleads that the plaintiff is dead, and A. says that he is the plaintiff ; the justices are to adjudge whether A., who now appears, be the same person who made the attorney. 9 Co. 30. b.

(B 5.) By Witnesses.

So, in dower, if the tenant pleads, that the husband is alive ; it shall be tried by witnesses. 9 Co. 30. b. Vide in Pleader, (2 Y 9.)

So, in an appeal by a woman, of the death of her husband, if the defendant pleads that the husband is alive. 9 Co. 30. b.

In an assise by A. who was the wife of B. 9 Co. 30. b.

So, whether such and such be summoners or viewers, shall be tried by the court by witnesses. 9 Co. 31. a.

So, whether a summons be well made. Cro. El. 42.

And the court themselves ought to make the examination, not the clerks. Cro. El. 43.

Where the trial is by witnesses, there must be two witnesses at least. Pl. Com. 12. a.

(C a.) Trial at bar ; when it shall be.

Trial shall be at bar, or at nisi prius.

[All applications for trials at bar must be decided on their own circumstances. 1 T. R. 363. Loft. 159.]

[A trial at bar is allowable, for the satisfaction of the court. 4 T. R. 292.]

If a justice of one bench or the other be concerned, the trial shall be at bar upon motion without affidavit. 1 Sid. 407.

So, if a master in chancery. Ibid.

[Granted on consideration of the consequence of conviction on an information. (Scil. Forfeiture of the auditorship of imposts.) Str. 52.]

[But not in an issuable term. Per Parker Ch. J. ibid. R. 1 H. Bl. 206.]

[Where plaintiff makes but one title, he shall have it, on affidavit of value, though several defendants have but small interest. Str. 479.]

[Granted on an information against a justice of peace for neglect and abuse in relation to deer-stealers, on affidavit of his fortune, and the great number of witnesses.]

N. B.

N. B. In information exhibited by attorney-general, he has a right to bring it to the bar. Str. 644.]

[No trial at bar granted before issue joined. Str. 696.]

[It shall not be granted on motion, on an information for a misdemeanor carried on by a private prosecutor. Str. 816.]

[But on an authority from the king to prosecute, it shall be granted as of right to the king in his own cause. Ibid.]

[There can be no trial at bar in London; for the citizens are not to be brought out of the city. Str. 854.]

[Trial at bar ought not to be granted, unless the case is of difficulty, or requires great examination and is also of considerable value. Andr. 271. Vide Doug. 437.]

[And the court will refuse it, though the estate is of great value, and the matter intricate, if many witnesses are old and infirm, and the place remote. Andr. 273. • Barnes, 447.]

[Or, if the court grant it when one of the witnesses is old, it will be on condition that he be examined on interrogatories, and that his depositions be read, if he die before the trial. Doug. 438.]

[The court will also, in some cases, lay the party applying under terms, that if he succeed, he shall be satisfied with nisi prius costs; but if he fail, he shall pay bar costs. Ibid.]

[Granted in action for criminal conversation, laid at 50,000*l.* damages, on defendant's affidavit of having twenty witnesses, consenting to plaintiff's examining a witness before a judge, and waiving privilege of parliament. Barnes, 438.]

[It may be moved for in ejectment, before appearance. Barnes, 455.]

When and how at nisi prius, vide Enquest, (A 1.—C 1, &c.)

### [(C b.) Trial by proviso.]

[A defendant cannot go to trial by proviso, unless there has been a default on the part of the plaintiff, though there has been a former trial, and though the defendant gave notice to the plaintiff of his intention to carry down the record. 1 Mars. 218. 5 Taunt. 577. 6 Taunt. 251.]

[The defendant in an issue directed by the court of chancery, cannot carry down the record to trial by proviso; but the court will give him leave to carry it down, upon a suggestion that the plaintiff means to delay the trial. 4 T. R. 767.]

[The only use of the rule for trial by proviso, where the record is carried down by proviso by the defendant, is, that if the plaintiff also takes the record down, his alone shall be tried. Therefore, it may be obtained at any time before trial, and even after notice of trial given to the plaintiff. 1 T. R. 695.]

### [(C c.) Trial by special jury.]

[If in a cause standing for trial within the term, it shall be tried within the term. 4 Taunt. 470.]

### [(C d.) Plain-

**[(C d.) Plaintiff's obligation to proceed to trial.]**

[In K. B. he need not give notice of trial before the term succeeding that in which issue is joined. 2 T. R. 734.]

[The plaintiff has the whole of the term succeeding that in which issue is joined to try the cause. 1 H. B. 123.]

[In a London cause the plaintiff is not bound to go to trial at the sittings after the term in which issue is joined, though joined early enough for that purpose. 4 T. R. 557. 1 H. B. 282.]

**[(C e.) Notice of trial.]**

[A fresh notice of trial is necessary though it be put off by the defendant. 2 Blk. 798.]

[Notwithstanding a peremptory undertaking to try, notice of trial is requisite, without which the defendant is not bound to take any steps, and therefore cannot claim the costs incurred by any steps he may have taken. 1 H. B. 222.]

[If a cause be made a remnant, it may be tried at the next sittings, without a new notice of trial; secus, where the trial is put off by rule of court. And even where plaintiff gives a peremptory undertaking to try at the next sittings or assizes, there, likewise, a new notice must be given, since the plaintiff, notwithstanding such notice, may decline trying his cause. 8 T. R. 245.]

[Notice of trial cannot be given pending a rule for changing the venue. 1 Taunt. 58.]

[See the rule as to notice for the sittings after term in London. K. B. 13 East, 393.]

[Notice may be given by continuation of a void notice, if given within regular time. 2 Blk. 1298.]

[The place of residence (by which the duration of the notice is regulated) is that where defendant resides on delivering the issue. 1 East, 688.]

[Where the defendant resides above forty miles from London, unless the cause has been treated as a town cause, there ought to be fourteen days notice of trial, though the arrest be made, and the venue laid in town. 2 Blk. 1205.]

[In a town cause, in case of a temporary residence in the country, the common notice is sufficient. 2 Price, 279.]

[In a town cause, where defendant is abroad, eight days notice is requisite. 4 T. R. 552.]

[A change of residence pending the action to beyond forty miles from London, does not entitle to the longer notice of trial, unless notified. 12 East, 427.]

[A cause which is commenced as a town cause, and not objected to, shall be considered as such in all its subsequent stages, especially after a verdict. 2 Blk. 992.]

[Rule relative to short notice in county causes. 3 T. R. 660.]

[When a cause has been suspended for a year after it was at issue, the defendant is entitled to a term's notice of trial; unless himself occasioned its suspension by injunction. Dougl. 71.]

[The

[The undertaking for short notice for the sittings, does not extend to the adjourned sittings. 7 Taunt. 452. 1 Moore, 160.]

[Where the objection was on the ground of a mis-trial, appears on the record, the verdict will not be set aside for a defect in the notice of trial. 11 East, 370.]

### [(C f.) Regulation of the trial.]

[Motions for, must be made to the judge who presides at N. P. 7 Taunt. 390.]

### [(C g.) Entering the trial on the record.]

[It must appear on the record that the trial was had by twelve jurors. 2 Blk. 718.]

### [(C h.) Mistrial.]

[The objection to a mistrial, unless when cured by statute, may be by motion in arrest of judgment. 2 M. & S. 270.]

[A mistrial is cured by the statutes of jeofails, only where the trial has been by a jury of the proper country. 2 M. & S. 270.]

### [(D) When the trial shall be put off.]

[If a party want the testimony of witnesses who are out of the jurisdiction of the court, and whom, therefore, he cannot compel to attend, the court may put off the trial from time to time till the other party consent that depositions shall be taken where they are. Cowp. 174. Vide 1 Bl. Rep. 512. Doug. 419.]

[But a trial will not be put off, on the general affidavit of the absence of material witnesses, where the case is suspicious, and the witnesses are foreigners, never likely to return to England. 1 Bl. 510.]

[And where a witness is likely to be absent for a considerable time, as eighteen months, a special case is requisite to put off a trial for want of his evidence. 1 Bl. 436.]

[Trial on collateral issues, though in capital cases, shall not be put off, unless the defendant make oath of the truth of his plea. 1 Bl. 4. 512.]

### [E 1.) New trial.]

The court may in any case grant a new trial, on the ground of excessive damages. 1 T. R. 277.]

[But in a case of tort, the court will not grant a new trial for excessive damages, unless they be outrageously disproportioned to the nature of the injury, or the circumstances of the parties. 2 Bl. 1327. 929. 2 T. R. 166.]

[The court did not grant a new trial in an action for criminal conversation, though the damages appeared to them excessive. B. R. 4 T. R. 651.]

[Nor, in an action for enticing away the plaintiff's wife. C. P. Willes, 577.]

After

[After a full trial by a competent jury, if no fresh light can be thrown on the case, a new trial shall not be granted. 1 Bl. 418.]

[Nor, shall it be granted where the verdict is not contrary to evidence or law, though contrary to the opinion of the judge. 1 Bl. 1.]

[If the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion on the question of law, though application be made on the ground of a mis-direction. 2 T. R. 4.]

[Surprise may be a ground for a new trial; but it is not necessarily so. 1 Bl. 298.]

[Nor, shall a new trial be granted, merely because the counsel of the party applying thought it prudent to omit material evidence, which they had in their briefs; nor, because another jury, in a cause, nearly similar, on hearing that evidence gave a different verdict. 2 Bl. 802. 2 T. R. 113.]

[But the discovery of new evidence, by the attorney of a defendant executor, then absent from England, though in the actual custody of the defendant himself, but not known by him so to be, is a ground for a new trial. 2 Bl. 955.]

[An exception to the competency of witnesses, discovered after a trial, is not of itself a sufficient ground for granting a new trial, though it may have weight with the court, where the party applying appears to have merits. 1 T. R. 717.]

[It is no ground for the court to grant a new trial, that a witness called to prove a certain fact, was rejected on the ground of incompetency, where another witness established the same fact, and the verdict was given on a collateral point. B. R. 3 East, 451.]

[Where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled, by any rule or practice, to a third trial. 2 Bl. 963.]

[Nor, will a new trial be granted in an action of debt, where the verdict was only for part of the sum demanded, being what was justly due. 2 Bl. 1205.]

[Where a verdict on an action for words is given for a defendant, clearly against evidence, yet, if the damages on a right verdict must have been trivial, a new trial will not be granted. 2 Bl. 851.]

[It will not be granted to give the defendant an opportunity of proving the illegality of a policy, which was not illegal on the face of it; he should have shewn that at the trial. 1 T. R. 84.]

[Value and importance are not of themselves sufficient grounds for granting a new trial, unless there be also some doubt in the question, though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. 2 T. R. 113.]

[New trials in ejectment are not usually granted, where there is a verdict for the defendant; otherwise, if there be a verdict for the plaintiff. 1 Bl. 348.]

[Vide in Pleader.]

[(E 2.) When there shall be a new trial without costs.]

[Where the plaintiff refuses to be nonsuited, contrary to the opinion of the judge, a new trial, if granted, shall be without costs. If he submit

mit to an erroneous nonsuit, it shall be set aside without costs. 1 Bl. 670.]

[Where a new trial has been granted, and nothing said, in the rule, about the costs of the first; although the second verdict be for the same party as the first, he shall not have the costs of the first trial. Doug. 438.]

Vide more concerning Trial, in Admiralty, (E 5, 6.)—Bastard, (D 2.)—Battel.—Chancery, (X—4 V).—Copyhold, (R 17.)—County, (C 11.)—Dett, (G 14.)—Information, (D 7.)—Justices, (T 3.—W 1, &c.)—Prohibition, (F 14.)—Wales, (D).—Pleader, (R 17.)

*Trial per medietatem Linguae.* Vide ALIEN, (C 8.)

## TROVER.

Vide ACTION UPON THE CASE UPON TROVER.—PLEADER, (2 F).

## TROY WEIGHT.

Vide LEET, (L 6.)—JUSTICES OF PEACE, (B 90.)

## TRUCE.

Vide ADMIRALTY, (E 8.)

## TRUST.

[(A) Private trustees.] p. 512.

[(B) Trustees for public purposes.] p. 514.

[(A) Private trustees.]

[Where there were no trusts to execute the words of trust in a will, held that devisees in fee, subjects, &c. took the ultimate remainder to their own use. 16 East, 283.]

[Devise of a renewable leasehold to A. for his own use and benefit, on his attaining twenty-one, upon trust that deviser's trustees should pay rent, perform covenants, and renew from time to time, and for that purpose make surrender, &c. The trustees take the legal interest until A. reaches twenty-one, and not a mere naked power. 1 M & S. 692.]

[The testator devised certain lands, part mortgaged in fee, and part, unincumbered, to trustees and their heirs to pay debts in aid of the personal estate, and divide the surplus and all his other lands, &c. to the first and other sons successively for life, with successive remainders to trus-

trustees and their heirs to preserve subsequent estates during the lives of the several tenants for life, with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male, with like remainders to his daughters for life, to trustees, &c. and to her first and other sons successively in tail male; with a power that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seized and possessed to trustees, on trust, by the rents and profits to pay a jointure to any wife, &c. for the term of each such wife's natural life only. There were also powers by deeds to charge the lands with younger children's portions, and to lease for twenty-one years, while the mortgages remained outstanding, and the trusts for payment of debts unperformed, the eldest son by deed reciting the will and power, conveyed lands to trustees and their heirs on trust, by the rents and profits to raise and pay a jointure to his wife, during her natural life only; and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment against the settler and testator during the wife's life. K. B. held that trustees took a fee. C. B. held that they took no legal estate. 11 East, 458. 3 Taunt. 316.]

[If an estate is devised to trustees during the life of A., the wife of B., in trust to pay the rents to C. during B.'s life-time, and on his death in case A. shall be then living, in trust to pay them to A. and C., and after the deaths of A. and C. without issue, then over to D. in fee; whereby there is no declaration of trust for the remainder of B.'s life, in the event of A. and C. dying before him without issue; yet if the intention manifestly appears to have been only to secure the rents to C. for his life, and to A. in case of her surviving B., the trust estate will be considered as determined on the death of A. and C. without issue, so that the fee will immediately vest in D., who by himself therefore may make a tenant to the *præcipe* for suffering a recovery. 1 T. R. 346.]

[An express devise in fee to trustees may be cut down to an estate for life, upon an implication of intent. 7 T. R. 433.]

[Where an estate was devised to trustees and their heirs to preserve contingent remainders; and there were several sets of limitations, each of an estate for life and in tail, the trustees to permit the tenants for life to receive the rents; and between each set of limitations the estate was limited again to the trustees and their heirs; held, that they took the legal interest only during the life estates. 7 T. R. 433.]

[Where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall arise to them by implication; but the uses in remainder limited on such lesser estate so given to them, shall be executed by the statute. 5 East, 162. 1 Smith, 383.]

[A testator having an estate settled on himself for life, remainder in trust to secure 500*l.* a year to his wife, in lieu of dower, remainder to trustees for 200 years, for better securing the annuity, remainder to himself in fee; gives 200*l.* a year to his wife, in addition to her jointure, his just debts being previously paid; and appoints three persons "as trustees of inheritance for the execution thereof." The trustees take

an estate in fee in remainder, subject to the term of 200 years. 3 Smith, 69. 7 East, 97.]

[Conveyance by deed to A., his heirs and assigns during the life of B., in trust to pay the rents and profits as B. should appoint, during her life; and after her decease to the use of such child or children, &c., and in such shares as B. should appoint, &c. The trustees only take during B.'s life. 1 N. R. 25.]

[A trustee lending his name as plaintiff is not permitted to release the action without leave of the court. 7 Taunt. 48.]

### [(B) Trustees for public purposes.]

[It seems that no action lies against commissioners (or their servants) appointed under an act of parliament to effectuate its provisions, unless they exceed their jurisdiction; and clearly not, where the act gives another remedy. 4 T. R. 794.]

[Where the act directs that monies recovered against commissioners for any thing done under it, shall be defrayed out of the money in the hands of their treasurer, they are nevertheless personally liable in the first instance. 8 East 41.]

[Trustees appointed under a turnpike act, with authority to cut drains in lands, making reasonable satisfaction to the owners thereof, are not liable to the actions of third persons thereby injured, if they acted to the best of their skill, and with the best advice. 1 Mars. 429. 6 Taunt. 29.]

[The trustees of a certain public road are empowered by statute, and required, "from time to time to cause such and so many lamp-irons or lamp-posts to be put along the sides of the said road, or upon the wall or pallisade of any house, &c. as they shall think proper; and also to cause such number of lamps to be provided as they should think necessary for lighting the said road." Under their directions the road is cleansed, and the scrapings brought to the side of the road. No lamps are placed by the road side, in consequence of which a passenger falls over the scrapings and breaks her arm. Held, that the trustees were not liable. The ground for charging them was, that they had neglected their duty in omitting to provide lamps. The ground of the judgment was, as it seems, two-fold: 1. The statute left it for them to determine whether any lamps were requisite: 2. The trustees of a public road are only punishable by indictment for a neglect of their duty, not by action. 4 M. & S. 27.]

[It seems that the trustees of a public road, who in furtherance thereof employ others under them, are not to be considered in the same light as are private individuals retaining others. Therefore they are not answerable for their misconduct. 4 M. & S. 27.]

[The trustees of a certain public road were empowered to make contracts for the cleansing the said road. They engage with a contractor; and the labourers employed by them, do the work so negligently as to injure a passenger. The trustees are not liable, since the labourers cannot (as the lime-burner's servant in 1 Bos. & Pul. 404. might) be considered as in their employment. No duty was imposed upon the trustees to see that the labourers did not commit any nuisance. 4 M. & S. 27.]

[By

[By a turnpike act trustees are appointed with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. A drain is cut by an order, signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiff's by which the latter is overflowed. An action is brought against one of the trustees, and held well. 1 Mars. 429. 6 Taunt. 436.]

[Where a turnpike act directed that actions for acts of the trustees should be brought against the treasurer; held, that the latter could not be sued for the act of fewer than all the trustees. 7 Taunt. 1.]

Vide Action on the Case for Deceit, (A 5.—E 2, 3.)—For Negligence, (A 1.)—Administration, (C 4.)—Chancery, (2 M 9.—3 R 3.—4 W 1, &c.)

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## TRUSTEE.

Vide CHANCERY, (4 W 7, &c.)

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## TUMBREL.

(A) *Tumbrel, &c. ; who shall have them.* p. 515.

(B) *Pillory.* p. 516.

(C) *Whipping.* p. 517.

(A) *Tumbrel, &c. ; who shall have them.*

The tumbrel, or trebutchet, is an instrument for the punishment of women that scold, or are unquiet, now called a cucking-stool. Nom. verb. Cucking-stool. Lamb. l. 1. c. 12. Vide Leet, (K).

Other instruments of punishment or correction are *furca*, or gallows. Fl. l. 2. c. 12. s. 19.

The pillory and stocks. Fl. l. 2. c. 12. s. 19. Kit. 13. a.

These instruments of correction none can set up without proper warrant.

And if the lord of a liberty set them up without warrant, he shall lose his franchise or liberty. Fl. l. 2. c. 12. fo. 75. 2 Rol. 203. l. 10.

And a man may have a pillory, tumbrel, and *furcas*, &c. by grant or prescription. 2 Rol. 203. l. 10.

So, every lord of a leet ought to have them. Kit. 13. a. Cro. El. 698. Fl. l. 2. c. 12. s. 19. Vide in Leet, (K).

And the neglect to have them is inquirable in the leet. Kit. 13. a. Fl. l. 2. c. 12. s. 19.

And for default the liberty may be seized. Fl. l. 2. c. 12. s. 19. Agr. Mo. 574. Cro. El. 698.

Or, the lord of the liberty shall be fined to the king for a neglect in his time. Per Scrope, Kel. 149. b.

## (B) Pillory.

The pillory is the usual punishment of any convicted of an infamous crime; as, perjury, forgery.

So, it was inflicted for false rates by a public assessor. Mod. Ca. 306.

So, for a libel on a magistrate, or the government. Cro. Car. 175.

A pillory and tumbrel, which are infamous, ought not to be used without good warrant. 3 Inst. 219.

By the st. 51 H. 3. st. 6. a pillory of convenient strength shall be in every liberty.

And by the st. 31 Ed. 1. de pistoriis, the pillory ought to be of convenient strength, that execution may be done without peril to the body of the offender.

[The head and hands of the offender ought to be put in and through the holes in the pillory, and so continue during the whole time; if this is omitted, it is a contempt, and the court will punish the undersheriff by fine and imprisonment. 2 B. M. 792.]

By the st. 51 H. 3. st. 6. Ass. Pan. & Cerv. if a baker offend, in not observing the assise, often, viz. above three times, he shall be set in the pillory without redemption.

So, by the same statute, if a brewer break the assise outrageously, or often, he shall be adjudged to the tumbrel, or other correction.

And by the st. 31 Ed. 1. de pist. if a brewer exceed the assise; for the fourth offence, he shall be set in the pillory without redemption.

By the st. 31 Ed. 1. de pist. if a butcher sells swine's flesh meazled, or flesh dead of murrain; for the second offence he shall be set in the pillory.

By the st. 31 Ed. 1. de Pist. if any sell deceitful oatmeal; for the third offence he shall be set in the pillory.

By the st. 31 Ed. 1. a forestaller, for the second offence, shall be adjudged to the pillory.

And by the st. 5 Ed. 6. 14. forestaller, regrator, and engrosser, for the third offence shall be adjudged to the pillory.

By the st. 19 H. 7. 6. he who sells pewter or brass by a deceitful beam or weights, shall forfeit 20s.; and if insolvent, shall be set in the pillory.

By the st. 11 H. 7. 4. he who sells by false weights; for the third offence shall forfeit 20s., and shall be set in the pillory.

By the st. 33 H. 8. 1. any convicted of getting money or other thing by counterfeit tokens or letters, shall be imprisoned, pilloried, or otherwise punished, as the justices think meet.

By the st. 2 Ed. 6. 15. artificers, &c. who conspire to enhance prices, for the second offence forfeit 20l.; and, if they do not pay it in six days, shall be put in the pillory.

By the st. 5 Ed. 6. 6. counterfeiters of seals to cloths shall be set in the pillory for the second offence.

By the st. 7 Ed. 6. 7. cutter or marker of fuel falsely, if insolvent, shall be set in the pillory.

By the st. 5 El. 9. convict of perjury shall be in the pillory, &c.

By the st. 5 El. 14. convict of forgery shall be in the pillory, &c.

By

By the st. 5 El. 16. convict of sorcery, &c. shall stand in the pillory six hours every quarter.

By the st. 18 El. 5. an informer, who compounds an offence without the assent of the court, shall stand in the pillory.

### (C) Whipping.

A person convicted of petit larceny shall be whipped.

But whipping ought not be inflicted without a proper cause.

And therefore, if a man in England inflicts whipping upon his slave brought from Russia, without cause, it seems unlawful. 2 Rush. 468.

And, by usage in the star-chamber, a gentleman ought not to be whipped. 2 Rush. 468.

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### TURBARY.

Vide COMMON, (A).

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### TURN OF A LIVING.

Vide ESGLISE, (H 3, 4.)

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### TURN OF THE SHERIFF.

Vide LEET, (A).

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### [TURNPIKE.]

[A stage coach is not "a carriage travelling for hire," within the meaning of a turnpike act, providing that the traveller or passenger in a carriage travelling for hire shall be considered as the person paying the toll, and that such payment shall not exempt such carriage re-passing with a different traveller or passenger. 10 East, 66.]

[An exemption in a turnpike act from toll on passing again with the same carriage, applies, though with different horses, being the same in number. 10 East, 66.]

[A public turnpike act, empowering trustees to erect toll-houses and lease the tolls, to persons advancing money thereon, with a proviso that there shall be no priority amongst different mortgagees, does not authorize them to lease the toll-house, since then one creditor would gain a preference over another. 2 T. R. 169.]

[Motion to stay proceedings in actions for penalties under the general turnpike act, must be made in bank. 11 East, 484.]

**VACATION.**

Vide TEMPS, (C 1, &c.)

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**VAGABONDS OR VAGRANTS.**

Vide JUSTICES OF PEACE, (B 76, &c.)

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**VALORE MARITAGII.**

Vide GUARDIAN, (H 7.)

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**VALUE.**

Vide JUSTICES, (O 3. 8.)—MONEY, (B 4.)—WASTE, (E 1.)

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**VARIANCE.**

Vide ABATEMENT, (G 8.—H 7.)—AMENDMENT, (D 7, 8.—V 3.)—  
BAIL, (R 7.)—OBLIGATION, (B 4.)—PLEADER, (C 14, 15.—S 24.  
30.)—RECORD, (C—D—F).

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**VENDITIONI EXPONAS.**

Vide EXECUTION, (C 8.)

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**VENIRE FACIAS.**

Vide ENQUEST, (C 1, &c.)—PLEADER, (2 S 12.—3 O 20.)—PROCESS,  
(D 8.)

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**VENTRE INSPICIENDO.**

Vide BASTARD, (C.)

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**VENUE.**

Vide ABATEMENT, (H 13.)—ACTION, (N 13.)—AMENDMENT, (H 1,  
&c.)—PLEADER, (S 9.)

VER-

**VERDEROR.**

Vide CHASE, (Q 2.)

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**VERDICT.**

Vide ABATEMENT, (I 34.)—AMENDMENT, (P).—APPEAL, (G 4.)—  
ESTOPPEL, (E 10.)—EVIDENCE, (A 5.)—PLEADER, (C 87.—E 38.—  
R 13.—S 1, &c.)—PREROGATIVE, (D 76.)

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**VERT.**

Vide CHASE, (N 1, &c.)

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**VESTED REMAINDER.**

Vide ESTATE, (B 17.)

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**VICAR.**

Vide ECCLESIASTICAL PERSONS, (C 10. &c.)

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**VICARAGE.**

Vide ECCLESIASTICAL PERSONS, (C 10, &c.)

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**VICTUALS AND VICTUALLERS.**

Vide JUSTICES OF PEACE, (B 32. 87, &c.)

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**VIDELICET.**

Vide PAROLS, (A 8.)

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**VI ET ARMIS.**

Vide ACTION ON THE CASE, (C 3.)—PLEADER. (3 M 7.)

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## VIEW.

(A) When it lies. p. 520.

(B) When not. p. 520.

[(C) Viewers, how appointed.] p. 520.

### (A) When it lies.

In all actions real, where the tenant does not know the certainty of the lands in the writ, he may demand a view of the land demanded. Bl. Nom. verb View.

[There may be a view in trespass, on affidavit that it will be better direction to the jury than any evidence. B. R. H. 156.]

[It is never granted without affidavit, except on actions of waste. Barnes, 467.]

[A view is not granted without hearing both parties, and examining into the propriety of it, unless the party applying consents, that if there is no view, or a view by any of the jurors (though not of the first twelve), yet the trial shall proceed, and no objection be made on account thereof, or for want of a proper return. 1 B. M. 252.]

[On a view, the shewers may shew not only the place in question, but also the marks, boundaries, &c. to enlighten the viewers; and may say to them, "These are the places to which we shall adapt our evidence at trial." Barnes, 458.]

### (B) When not.

But by the common law, view did not lie in dower *unde nihil habet*. 2 Inst. 481. R. 2 Lev. 117.

Nor, in any writ of dower, where the husband died seised. 2 Inst. 481. Semb. 2 Lev. 117.

Nor, by the st. W. 2. 48. *in dote tenemento*, which the husband aliened to the tenant of his ancestor. 2 Inst. 481.

If dower be for rent, of which her husband died seised, or which the tenant has by the release of the husband, the tenant shall not have the view. 2 Inst. 482.

So, the tenant shall not have the view, where dower is demanded of a thing certain; as, of the marshalsea. 2 Rol. 728. l. 25.

Nor, if it be a demand of tithes. R. 2 Rol. 728. l. 45.

Yet the tenant is not ousted of the view where he or his ancestor disseised the husband; for this is not an alienation. 2 Inst. 481.

Or, if the husband aliens to a woman, who afterwards marries the tenant; for the alienation was not to the tenant himself. 2 Inst. 481.

After a verdict in an assise, default of view shall not be alleged. R. Mo. 68.

### [(C) Viewers, how appointed.]

[Vide 4 Ann. c. 16.]

Vide more concerning View, in Abatement, (I 25.)—Forcible Entry, (D 1. 14.)—Pleader, (2 Y 3.—3 O 21.)

VIEW

## VIEW OF FRANKPLEDGE.

Vide **LEET**, (A.)

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## VI LAICA AMOVENDA.

Vide **ESGLISE**, (N 12.)

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## VILL.

Vide **ABATEMENT**, (H 18.)—**PARISH**, (C 1, 2.)

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## VILLENAGE.

(A) **Villien**. p. 521.

(B) **Villein**. p. 521.

(C) **Remedy for a villein**.

(C 1.) *Nativo habendo*. p. 521.

(C 2.) When the sheriff cannot seize upon him.  
p. 522.

(C 3.) *Libertate probanda*. p. 522.

[(D) **Slavery**.] p. 522.

(A) **Villien**.

Villenage is a servile tenure, whereby a man holds land to render to his lord villein service. (By st. 12 Car. 2. 24. all tenures are turned into free and common socage.) Lit. s. 172. 174.

As, to carry and re-carry the dung of his lord out of the city, or out of his lord's manor, unto the land of his lord, and to spread it there, &c. Lit. s. 172.

And it may be done by a free man, or by a villein. Co. Lit. 116. Vide Homage.

(B) **Villein**.

Every villein is so by prescription, or by his own confession, in a court of record. Lit. s. 175.

(C) **Remedy for a villein**.

(C 1.) *Nativo habendo*.

If the lord claims an inheritance in his villein, who flies from his lord against his will, and lives in a place out of the manor, to which he

he is regardant, the lord shall have a *nativo habendo*. F. N. B. 77. A.

And upon such writ directed to the sheriff, he may seize him who does not deny himself to be a villein. Ibid.

(C 2) When the sheriff cannot seize upon him.

But if the defendant say, that he is a free man, the sheriff cannot seize him; but the lord must remove the writ by *pone* before the justices *in eyre*, or in C. B., where he must count upon it. F. N. B. 77. C. D.

So, the sheriff cannot seize a villein dwelling in the king's antient demesne; for the writ *de nativo habendo* says, *nisi sit in dominico domini regis*. F. N. B. 77. E. Co. Lit. 137. b.

So, by the custom of London, if he has dwelt for a year and a day within the city. R. Mo. 2.

So, if he be professed in religion; for he is dead *civiliter*. Lit. s. 202.

(C 3.) *Libertate probandâ*.

So, upon a *nativo habendo* delivered to the sheriff before removal by *pone*, the defendant may sue a writ *de libertate probandâ*; whereupon the whole shall be removed before the justices *in eyre*. F. N. B. 77. C.

And after removal, nothing shall be done upon the *libertate probandâ*; but the lord shall count upon the *nativo habendo*. F. N. B. 77. D. G.

Vide more concerning Villenage, in Abatement, (E 1.—F 3.)—Homage (D).

### [(D) Slavery.]

[Slaves, by landing in England, are here emancipated. Loft. 1. Excepting the case where a man confesses himself a villain in gross, in a court of record. Ibid.]

[Contracts relating to slavery, made in England, to take effect abroad where slavery is allowed, are valid. Loft. 1. And made by a slave abroad in order to his manumission, may be enforced here. 3 B. & P. 69.]

## VISCOUNT.

### (A) Sheriff.

(A 1.) Who may be. p. 523.

(A 2.) How he begins his office. p. 524.

### (B) Deputies of a sheriff.

(B 1.) Under-sheriff. p. 525.

(B 2.) County-clerk. p. 525.

(B 3.) Deputies to the sheriff for replevins, &c. p. 525.

### (C) The

(C a.) The authority of a sheriff.

- (C 1.) Judicial. p. 526.
- (C 2.) To suppress insurrection.—When he shall take the *posse*. p. 526.
- (C 3.) When he has no jurisdiction. p. 526.
- (C 4.) Ministerial. p. 527.
- (C 5.) To collect the rights of the king. p. 527.

[(C b.) Privileges.] p. 527.

(D) Remedy against a sheriff.

- (D 1.) For neglect of his duty. p. 528.
- (D 2.) For misfeasance. p. 528.

(E) What a sheriff may or may not do.

- (E 1.) In person. p. 530.
- (E 2.) By his officers. p. 530.

(F 1.) What fees he may take. p. 530.

- (F 2.) Remedy for his fees. p. 534.

[(G a.) Proceedings by and against.] p. 535.

(G b.) Sheriff's account.

- (G 1.) When it shall be made, and of what things. p. 540.
- (G 2.) Of what things a sheriff shall not be charged. p. 542.
- (G 3.) How enforced to make his account. p. 543.
- (G 4.) How the sheriff shall be discharged by *quictus*. p. 544.
- (G 5.) Charge of his patent and account. p. 544.

(A) Sheriff.

(A 1.) Who may be.

The antiquity of the office of sheriff, and how constituted, vide in County, (B 1.)

But by the st. de Linc. 9 Ed. 2. none shall be sheriff unless he have sufficient land in the same county to answer to the king and his people. Confirmed by the st. 4 Ed. 3. 9. and 5 Ed. 3. 4. 14 Ed. 3. 7. 13 & 14 Car. 2. 21: s. 7.

So, no steward or bailiff to a great lord, unless out of service, that he may attend to execute his office.

So,

So, by the st. 14 E. 3. 7. no sheriff shall continue in office above a year. Confirmed by the st. 42 Ed. 3. 9. Vide County, (B 2.)

So, temp. R. 1. it was provided, that a sheriff should not be a justice within his county. Mad. 639.

[Sub-sheriff to act in case of death of sheriff. 3 G. 1. c. 15.]

(A. 2.) How he begins his office.

The sheriff, after nomination to his office, and before his patent delivered, must be bound in a recognizance in the exchequer to make account, and appoint a sufficient under-sheriff for execution of process.

So, he must find surety for performing his office, if the king pleases. Mad. 642.

So, he must qualify himself within three months, by taking the test, according to the st. 25 Car. 2. 2.

After such recognizance given, he must procure, out of chancery, the patent of office, the patent assistance, and the writ for discharge of the old sheriff. Crompt. Off. of Sher. 202, 203. Vide County, (B 1, &c.)

He must take by indenture from the old sheriff all the prisoners and writs, &c. in his custody. Crompt. Off. Sher. 203. Vide County, (B 3.)

Also, before the sheriff acts in his office, he must take an oath, that he will truly serve the king in the office of sheriff, &c., truly keep the king's rights, and all that belongeth to the crown, &c., not respite the king's debts for gift or favour, where it may be done without great grievance, rightfully treat the people in his bailiwick, &c., truly acquit at the exchequer all those of whom he shall receive any thing of the king's debts, nothing take whereby the king may lose, or his right be letted, &c., truly return and serve the king's writs, &c., take no bailiffs but such as he will answer for, &c., return reasonable issues, &c., make due panels, &c. hath not, nor will, let to farm, &c. his sheriffwick or any office belonging to it, truly execute the laws, and in all things behave himself for the honour of the king, and good of his subjects, and discharge his office to the best of his skill and power. Crompt. Off. Sh. 202. Vide for his oath the st. 3 Geo. 15. Vide Mad. 640. Vide Serement, (A).

[If sheriff takes bond of his bailiff to pay 20*d.* for every defendant's name in every warrant in mesne process, it is not letting his sheriffwick to farm. C. B. Fort. 368.]

If the sheriff neglects his oath, he will be in danger of perjury, and also of imprisonment of his body, and ransom at the king's will. Dy. 61. a.

So, if he refuses the office, being nominated by the king, an information lies against him. 2 Mod. 306.

Though he was excommunicated, whereby he cannot take the test to qualify. R. 2 Mod. 300.

Or, was not qualified by taking the sacrament within a year preceding. (Vide 4 Mod. 269. Salk. 167. 1 Ed. Raym. 29. 2 Vent. 248.)

[A criminal information was granted for refusing the office of sheriff; because the public good required that the office should not remain vacant,

cant, and therefore that the matter should be determined by a more speedy process than indictment, which probably would not be determined till just before the expiration of the year. 2 T. R. 731.]

**(B) Deputies of a sheriff.**

**(B 1.) Under-sheriff.**

The sheriff of ancient time had his under-sheriff. Hob. 13.

He is mentioned in the st. W. 1. 15. 2 Inst. 191.

And he by the st. 27 El. 12. must take an oath, which is now prescribed by the st. 3 G. 15.

When the sheriff appoints his under-sheriff, he, *ex consequenti*, gives him authority to exercise all the ordinary office of the sheriff himself; as, to execute process, &c. R. Hob. 13.

And therefore, a bond or covenant, that he shall not execute without his consent, is void. Ibid.

But a sheriff may constitute his under-sheriff at his will, and remove him when he pleases. Ibid.

So, though he makes him irrevocable, he may remove him at pleasure; for he is only his deputy. Hob. 13.

So, he need not make an under-sheriff; for he may exercise the office himself. R. Hob. 13.

If a sheriff makes an under-sheriff, he may take a bond or covenant to indemnify him from escapes, &c. R. Hob. 14.

But a sheriff cannot enable his under-sheriff to do a thing which the sheriff himself ought to do in person; as, to execute a writ of waste, re-disseisin, &c. Hob. 13.

[The high sheriff can appoint only one under-sheriff extraordinary. 2 Wils. 378.]

[The sheriff cannot depute two persons to take an inquest. 2 Wils. 378.]

So, by the st. 3 G. 15. none shall sell, buy, let, or take to farm the office of under-sheriff, &c. or other office belonging to the office of high sheriff, nor contract for the same for money or other consideration, directly, or indirectly, &c. on pain of 500*l.*; a moiety to the king, a moiety to him who will sue, &c. Provided the suit be in two years.

Provided, nothing in this act shall prevent the sheriff, under-sheriff, &c. from taking the just fees and perquisites of his office, or from accounting for them to the sheriff, or giving security to do so, or from giving, or taking, or securing a salary or recompence to the under-sheriff, &c.

**(B 2.) County-clerk.**

So, the sheriff may make a county-clerk. Vide in County, (C 1.)

**(B 3.) Deputies to the sheriff for replevins, &c.—See Replevin.**

So, by the st. 1 & 2 Ph. & M. 12. the sheriff, at the first county day, or in two months after he receives his patent, shall appoint and proclaim four deputies, living twelve miles distant from each other, to make replevins, &c.

By

By an order in the exchequer, all sheriffs shall assign their able attorney and deputy in that court, sitting the court, to attend the court, and receive and return all writs, &c. And every sheriff, on his giving a recognizance, shall deliver to the clerk in the remembrancer's office the name of the attorney or deputy assigned. Ord. and Rules in Exch. Rule 45. p. 20.

So, by a rule in C. B. M. 1654, the sheriff shall have a deputy in court to receive and return writs, whose name and place of abode in London or Westminster shall yearly, before Hilary term, be set up in the clerk of the warrant's office. Mills, 2.

### (C a.) The authority of a sheriff.

#### (C 1.) Judicial.

The authority of a sheriff is judicial or ministerial.

The judicial authority of a sheriff consists in holding the county court and torne. Of which vide County, (C 1; &c.)—Leet, (A).

So, by the common law the sheriff was conservator of the peace. Vide in Justices of Peace, (A 4.)

But now by the st. 1 M. sess. 2. ch. 8. no sheriff shall exercise the office of a justice of peace within his county, during the time that he acts as sheriff.

So, in a writ of re-disseisin, the sheriff acts as a judge, as well as a minister. Vide in Assise, (F 2.)

So, inquiry of waste.

So, in admeasurement of pasture.

When a sheriff executes his judicial authority, he must do it in person; and it is not sufficient by the under-sheriff, or other deputy.

#### (C 2.) To suppress insurrection.—When he shall take the *posse*.

If there be any rebellion, insurrection, or riot, in the county, the sheriff may take the *posse comitatus* for the suppression of it. Crompt. Off. Sher. 209. a. 210. a.

So, if there be an invasion by the king's enemies.

Or, any affray, unlawful assembly, or breach of the peace within his county. (Vide Crompt. Off. Sher. 204. 209, 210.)

So, if it is necessary for apprehending of traitors, felons, &c. within franchises or without.

So, for the execution of judicial process, vide in Rescous, (D 7.)

Or, if he finds resistance in the execution of any process or the king's writ, vide in Return, (D 6.)

The sheriff in such cases may require the aid of all persons, above fifteen and able, within his county.

So, may the under-sheriff or his known bailiff, having the sheriff's warrant.

#### (C 3.) When he has no jurisdiction.

But by the st. Mag. Chart. 17. *nullus vicecomes, &c. teneat placita coronæ nostræ*.

#### (C 4.) Minis-

## (C 4.) Ministerial.

The ministerial office of sheriff consists in the execution and return of all writs and process to him directed. Dy. 61. a. For which vide Execution, (G).—Process per tot.—Return per tot.

In bailment of prisoners. *De quo vide* in Bail, (F 10.—G 2.)

In making replevin. *De quo vide* in Pleader, (3 K 1, &c.)—Replevin, (D).

In election of knights and burgesses for parliament, coroners and verderors. For which vide Parliament, (D 4, &c.)—Officer, (G 3.)

In attendance upon the judges, justices, &c.

In proclamation of statutes.

And in keeping and collecting the rights and revenues of the king. Mod. 242.

## (C 5.) To collect the rights of the king.

The sheriff by his oath is bound timely to keep the king's rights, and all that belongs to the crown, &c. Vide ante, (A 2.)

And it was his duty to take care of the king's manors, &c. and collect his revenue. Mad. 643.

And therefore, the sheriff *ex officio* may seize and take to the king's use, the profits of all lands within his county, that come to the king by descent, remainder, reverter, or escheat. Mad. 242. 634.

Or, by attainder for treason, petit treason, or felony.

The temporalities of a bishoprick. Mad. 207, &c.

So, before the st. 12 Car. 2. 24. the lands which he had by ward, or premier seisin.

So, upon office found, the sheriff may seize and take for the king the profits of the lands of aliens, idiots, or lunatics.

Of lands forfeited to the king for waste, or *cesser* for two years by the king's tenant.

By alienation in mortmain, or without licence.

By a condition broken, feoffment by collusion, &c.

So, where the king has year, day, and waste.

Or, seizure is made for a contempt.

In all cases, where an office is found before commissioners, and not the escheator, the sheriff shall be charged with the profits.

But he shall be charged only for the annual value found by the office.

And if the office does not entitle the king to entry, but only to his action, the sheriff ought not to make seizure without warrant.

## [(C b.) Privileges.]

[The court will protect a sheriff between two contending parties, without putting him to file a bill of interpleader. 4 Taunt. 585.]

[Where a sheriff behaves fairly, and prays the assistance of the court, he shall not be put to try a question of the bankruptcy of the defendant, between his assignees and the plaintiff, at his own expence. 1 Taunt. 274.]

[A sheriff acting fairly under a writ, without notice of any act of bankruptcy, will be protected when sued, unless indemnified, and a nominal defendant only. 1 Taunt. 274.]

[Where

[Where bail above are put in but not justified, and the sheriff being fixed brings an action on the bail bond, to which the defendant pleads *compensat ad diem*; the court will on motion by the sheriff, order the recognizance of bail, in the original action, to be struck off the file, though the defendant allege that the sheriff was fixed through his own negligence; for that should be the subject of motion to stay the proceedings on the bail bond. 1 Mars. 520. 6 Taunt. 169.]

### (D) Remedy against a sheriff.

#### (D 1.) For neglect of his duty.

If a sheriff refuses or neglects to do his duty, an action upon the case lies against him; as, if he does not return process returnable, or makes a false return. Vide Action upon the Case for Negligence, (A 2.)—Return, (F 1.)

[All actions for breach of duty in the office of sheriff must be brought against the high sheriff, though the actual default be that of the under-sheriff or bailiff. Cowp. 403.]

[But where a special bailiff is nominated by the plaintiff or his agent, the sheriff is not bound to return the writ. 2 Bl. Rep. 952.]

So, if by his consent, or neglect, he suffers an escape, debt lies, or an action upon the case. Vide Action upon the Case for Negligence, (A 2.)—Escape, (B 1, &c.)—Pleader, (2 P 1.)

[But an action does not lie against the sheriff, on a promise to execute a bill of sale to the plaintiff's nominee; the legal and proper mode of compelling a sale by the sheriff, is by writ of *venditioni exponas*. Cowp. 406.]

And the court will not direct the sheriff, upon motion, what he ought to do. 2 Mod. Ca. 315.

Vide post. (F 2.)

#### (D 2.) For misfeasance.

So, by the st. 3 Geo. 15. a sheriff shall not omit to tort any sum received of a debtor, and answer it in his account; and if he *nihil* any money levied or received, &c. shall forfeit treble damages to the party aggrieved, and double the sum *nihil*ed, &c.; to be decreed by the court in a summary way, &c.

By the st. 6 Geo. 21. s. 53. he shall not deliver blank warrants to attornies, &c. before a writ comes to him, on pain of 10*l*.

[The sheriff is liable *civiliter*, but not *criminaliter*, for the acts of his bailiffs; the meaning of which is, that he is not liable to be indicted or imprisoned, or subject to any corporal punishment for the acts of his bailiffs; but where it rests in damages, he shall make the party a pecuniary satisfaction. 2 T. R. 156. Vide infra, (F 1.)]

[If a bailiff on warrant on *fi. fa.* against A. takes the goods of B., trespass *vi et armis* lies against the sheriff, even though he or his deputy does not recognize the act. 3 Wils. 309.]

[So, also an action of trespass and false imprisonment lies against the sheriff for trespass and false imprisonment committed by his officers in the execution of process. S. C. 3 Wils. 317. Vide Doug. 40.]

[The sheriff is not liable for seizing goods in execution after an act of bank-

bankruptcy committed; but, if he sells them after the commission issues, trover lies. 1 B. M. 20.]

[Actions for breach of duty of the office of sheriff, must be brought against the high-sheriff, though the breach was by the default of the under-sheriff or bailiff. Cowp. 403.]

[In an action of trespass against the sheriff for the wrongful act of the bailiff, it is not enough (in order to affect the sheriff) to prove him a general bailiff, and that he had given a bond of indemnity to the sheriff as such, together with proving the copy of the warrant, under which he entered and seized the plaintiff's goods; but the privity between such bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff, or at least by proving such notice to produce it, as will in case of non-production, let in secondary evidence of its contents: 7 T. R. 113.]

[Confession of an escape by the under-sheriff is evidence in an action against the sheriff, because he is the general servant of the sheriff. 1 Ld. Raym. 190.]

[Since bail below are liable for the plaintiff's demand up to the penalty of the bail-bond, though it exceed the sum sworn to, and costs; the sheriff, on discharging the defendant, &c. without taking a bond, is liable to the same extent. 8 T. R. 29.]

[The sheriff is bound to take notice of all the different liberties within his county; so that he will be liable to the owner of any one which he invades. 2 T. R. 10.]

[If a bailiff on a *f. fa.* against the goods of A. take those of B., trespass lies against the sheriff. 3 Wils. 309. 2 Blk. 832. Lofft. 81. Doug. 40.]

[A sheriff is liable, even under a penal statute, for the misconduct of his officer, *colore officii*, when charged to execute the law. 11 East, 25. Thus, under 32 Geo. 2. c. 28., 2 T. R. 712., though the act be an indictable offence. 2 T. R. 148.]

[The bailiff's name indorsed on the writ is sufficient evidence that he was authorized by the sheriff to arrest, without proving the warrant. Cowp. 66.]

[A sheriff is only liable for the misconduct of his officer when charged by him with executing the law; and therefore, when sued for such misconduct, he must be connected with him in the affair in question, and shewn to have deputed to him the authority abused. Proof that the person who committed the trespass was his general bailiff, and had given him a bond of indemnity, is not sufficient for this purpose. 7 T. R. 113.]

[In an action against the sheriff for not arresting, it is not sufficient evidence to connect the sheriff with his officer, that the officer's name appears on the writ, and that the writ has been returned *non est inventus*, —the sheriff having gone out of office before the return. 1 Mars. 554. 6 Taunt. 231.]

[The copy of the indorsement of a bailiff's name on a writ, is no proof against the sheriff that the person there named was the bailiff employed to levy. 7 Taunt. 8.]

[Where a special bailiff has been appointed to execute a writ at the instance of the party who sued it out, the sheriff is not answerable for

its execution. The party, therefore, cannot rule him to return it. 4 T. R. 119. 2 Blk. 752.]

[If the defendant is arrested by a special bailiff of the plaintiff's nomination, the sheriff is not answerable for the bailiff's misconduct, nor for the forthcoming of the prisoner, until he is actually in gaol, or otherwise in the sheriff's actual custody. 8 T. R. 505.]

[A sheriff is not liable for the misconduct of the bailiff of a franchise situated within his county. 2 T. R. 5.]

### (E) What a sheriff may or may not do.

#### (E 1.) In person.

A sheriff cannot do execution where he himself is a party; and therefore an extent by him, when he is conusee, will be void. R. Mo. 547. Vide ante, (C 1. 3.)

[And where he is plaintiff, a *latitat* directed to himself is ill. 1 Bl. Rep. 506.]

#### (E 2.) By his officers.

A sheriff may make a warrant to his bailiff for execution of process, &c.

So, he may make a warrant to a special bailiff named to him by the plaintiff, and take security for his indemnity. R. 1 Leo. 132. Cro. El. 271.

But a special bailiff need not take the oath required by the st. 27 Eliz. 12. R. Jon. 250. 2 Lev. 151.

Nor, any other bailiff of a sheriff, who has not the return of writs. Semb. Jon. 249.

And he shall be intended a special bailiff, unless the contrary appears. Semb. 2 Lev. 151.

Yet a special bailiff, being allowed by the sheriff, will be an officer to the sheriff, who shall answer for an escape by such bailiff. Jon. 65.

And therefore, an *assumpsit* to pay such special bailiff more than the fees allowed by the statute, will be extortion, and void. R. Jon. 65.

[The under-sheriff himself may assign a bail-bond in the name of the high-sheriff, since st. 4 & 5 Ann., but the under-sheriff's clerk may not. Str. 60.]

### (F 1.) What fees he may take.

By the st. W. 1. 26. no sheriff, or other minister of the king, shall take a reward to do his office, &c. Vide Extortion, (A 2.)

And by the st. 4 Ed. 3. 9. sheriffs shall receive and safely keep in prison thieves and felons, by delivery of the constables, without taking any thing for the receipt.

By the st. 23 H. 6. 10. no sheriff, under-sheriff, bailiff, &c. shall take any profit or avail of any person by them arrested or attached, or for letting to bail, or shewing favour, except *ut infra*.

Nor, for making any return, or panel.

So, by the st. 28 Eliz. 4. sheriff, under-sheriff, bailiff of franchise, or any of their officers, shall not, directly or indirectly, take for an extent or execution of body, land, or goods, more than *ut infra*, on pain  
of

of treble damages to the party, and 40*l.*; a moiety to the king, and a moiety to him that will sue.

[And the sheriff is liable to treble damages in an action by the party grieved, for the act of his officer, in levying more than the fees allowed by the statute. 2 T. R. 148.]

And there is little doubt but an action may also be maintained against him by a common informer, for the penalty. Ibid. by all the judges in B. R.]

And therefore, for execution, or return of a *capias utlagatum*, or warrant thereon, no fee is due to the sheriff. Per Cur. Litt. 65.

So, by the st. 3 G. 15. no sheriff, &c. shall take any fee of a debtor to the king, &c. save 4*d.* for an acquittance. Vide Extortion, (A 2.—E). And shall take poundage on a *ca. sa.*, &c. only for the sum remaining *bonâ fide* due, which shall be specified on the back of the writ, &c. on pain as for extortion, &c. (vide for this, Extortion, (A 2.—E), and 200*l.* besides; a moiety to the king, a moiety to him who will sue, &c.

But by the st. 23 H. 6. 10. sheriff may take for arrest 20*d.*, the bailiff 4*d.*, and gaoler, if committed to prison, 4*d.*, for a copy of a panel 4*d.*, for bail-bond 4*d.*

So, by the st. 28 El. 4. he shall not take for an extent or execution on body, lands, or goods, more than 12*d.* for every 20*s.*, where the sum exceeds not 100*l.*, and 6*d.* for every 20*s.* over and above an 100*l.*

And by this act he may take 12*d.* in the pound for the first 100*l.* and 6*d.* per pound for every pound above 100*l.*; for it was not intended that he should take only 6*d.* per pound for the whole sum, where that exceeds 100*l.* R. Cro. Car. 287. Dub. Cro. El. 395. Acc. Noy, 28. 76. R. Latch, 17. 51. Jon. 307. Vide 2 T. R. 148.

If there be execution by *capias ad satisfaciendum*, the sheriff shall have his fees for the whole debt. 1 Sal. 331. Skin. 363.

So in execution by *elegit*. Dub. 1 Sal. 331. Per Holt, 1 Sal. 333. R. Sal. 209.

Or, by *feri facias*. Skin. 363.

Though the writ be erroneous, he shall have his fees. R. 1 Sal. 332.

So, he shall have fees upon an execution of a judgment in a *scire facias*. 5 Mod. 97.

So, he shall have fees for money levied upon an extent out of the exchequer. Park. 177. Infra, p. 532, 534.

So, if he levies a fine for a misdemeanor by process of B. R., his poundage shall be allowed upon payment to the clerk of the crown. 2 Jon. 185.

And the sheriff himself shall have the fees for execution, not his bailiff. Semb. Latch, 19. 52.

And shall have the fees, though the execution be within a corporation, for the proviso of the statute extends to execution upon suits within a corporation, which is not a county of itself. R. Latch, 51. Vide post, (F 2.)

[He is not entitled to retain poundage out of money levied on an attachment for non-payment of money. 2 East, #10.]

[Quære, Is he entitled to an action under the stat. 23 H. 6. c. 9. Ibid.]

So, by the st. 3 Geo. 15. sheriff, bailiff of franchise, &c. may take, on executing an *habere facias possessionem*, or *seisinam*, 12*d.* for every 20*s.* per ann. value of the lands not exceeding 100*l.* per ann., and 6*d.* for every 20*s.* per ann. above that value.

So, by the st. 8 Geo. 25. no sheriff shall take for the extent and liberate, and *habere facias possessionem*, or *seisinam* on the real estate, and levy on the personal estate by virtue of such extent, any more than the same fees that are appointed by the st. 3 Geo. 15. for executing an *elegit*, *habere facias possessionem*, or *seisinam*.

So, by the st. 3 Geo. 15. a sheriff, who shall levy a debt or other sum (except post fines) due to the king by process on the summons of the pipe or green-wax, by *levari facias* out of the court of exchequer, shall have 12*d.* out of every 20*s.* for any sum not exceeding 100*l.*, and 6*d.* out of every 20*s.* for every sum above the first 100*l.* by him levied.

And, if the levy by process on a *feri facias*, and extent out of any of the offices of the court of exchequer, 18*d.* out of every 20*s.* not exceeding 100*l.*, and 12*d.* for every 20*s.* after the first 100*l.* levied.

Provided he answers the same on his account by the general sealing day of the term, wherein he ought to be dismissed the court, or by the time granted him for passing his account by warrant from one of the barons.

If the sheriff, having seized goods or personal estate by process, &c. for a debt to the crown, die, or be superseded before a *venditioni exponas*, or sale, the barons sitting, or any one, may apportion the fees and poundage between the preceding and subsequent sheriff.

[Sheriff is entitled to poundage on extents in aid; and if the money is paid, he is entitled to the whole poundage, though a *venditioni exponas* could not have issued till after he was out of office. Parker, 177.]

[But he is not entitled to any other costs and charges. Ibid.]

[On action brought in exchequer by sheriffs of London on bail-bond, taken in their own names for appearance of defendant, taken on exchequer process on prosecution of attorney-general on behalf of the crown, for custom-house penalties and forfeiture, and *testatum ca. sa.* into Hertfordshire against bail, sheriff of H. is entitled to his poundage, for this is not the suit of the crown. 4 B. M. 1981.]

[By st. 7 G. 3. c. 29. he is not entitled to poundage for taking body in execution on process at the suit of sheriff, &c. on bail-bond for appearance of person sued for duties, or for penalty for smuggling, or in any case where he would not be entitled, if the suit was directly in the name of the crown.]

[By stat. 14 G. 3. c. 20. prisoners acquitted or discharged by proclamation, shall be immediately set at large in court, without paying any fee; and treasurer of county, &c. shall, on judge's certificate, pay the usual fee, not exceeding 13*s.* 4*d.*]

[The sheriff is entitled to levy costs under 43 Geo. 3. c. 99. on an extent against a collector of taxes; and the sheriff's poundage is included in word charges, and may be levied; and it is payable where the money is paid in before a *venditioni exponas* has issued, although the proceeding is obviated thereby. 3 Price, 280.]

[Where the law imposes a duty upon an officer, he cannot claim a remuneration for fulfilling it, unless the law has expressly conferred such right. The sheriff's right, therefore, to poundage, rests entirely upon the positive enactments of statutes, within which he must bring himself, in every case where he claims poundage for executing a writ. *A capias utlagatum*, on mesne process, in a private suit, is not "an extent or execution," within the meaning of 29 Eliz. c. 4.; in its original form it is for the punishment of the party's contumacy, and not for the payment of a debt; there are no means of estimating the sheriff's right to poundage under it, for the whole of the defendant's goods are to be taken, and not property to such an amount. Therefore, the sheriff is not entitled to poundage under the st. 1 Eliz. for executing such writ. 2 M. & S. 294.]

[The sheriff is not entitled to poundage upon stamps in the possession of a distributor seized under an extent. Wightw. 95.]

[The sheriff cannot claim the expence incurred in keeping an officer in possession of goods seized by him under a writ. No statute has given him that right. 2 M. & S. 294.]

[The sheriff, besides the poundage, charged 5 per cent. for an auctioneer to sell malt; the charge was disallowed. 2 Anst. 412.]

[The fees of the sheriff's officer for making an arrest, are to be regulated by the court; and a regulation by the sessions, though acted upon for a long time, is a nullity. 3 T. R. 417.]

[Not (to poundage) until the goods are sold. Lofft. 433.]

[Before the st. 43 Geo. 3. c. 46. the sheriff might have brought debt against the plaintiff for poundage under an execution at his suit. The statute provides, that the plaintiff may, where his execution is against the goods, &c. levy the poundage over and above the sum recovered. This has changed the former rights of the sheriff, since the act passed to give a boon to the plaintiffs, and entitle him to levy that in which he stands indebted to the sheriff. 4 M. & S. 256.]

[If on an extent issuing against the acceptors of bills of exchange, drawn in favour of officers of the crown for public money received by the drawers, and admitted by them to the acceptors, for the purpose of levying the crown's debt, the drawers, after the execution of that process, take up and pay the bills, they are not liable to pay the sheriff's poundage on the levy; and the sheriff having retained, under an order of the court, a sum for poundage in his hands, will be ordered to restore it to the assignees of the bankrupt acceptor's estate. *Semble*, whatever be due to the sheriff for poundage, in such a case, should be paid by the crown. 2 Price, 58.]

[A sheriff who levies under a writ of execution, is entitled to his poundage, notwithstanding the parties afterwards, and before sale, compromise the debt. 5 T. R. 470.]

[The st. 29 Eliz. c. 4. enacts, that the sheriff shall be entitled to poundage upon such sum as he shall levy or extend "and deliver in execution." Notwithstanding these latter words, the sheriff may claim poundage in a case where he has levied under an execution, which, together with the judgment, is afterwards set aside for irregularity in the plaintiff, and the proceeds restored. If the sheriff has levied regularly, he cannot be affected by the irregularity of the antecedent proceedings. 4 M. & S. 256. Lofft. 253.]

[The 50*l.* penalty against officers for extortion, inflicted by st. 32 Geo. 2. c. 28. is not recoverable, unless a table of fees has been previously made out pursuant to the statute. 2 N. R. 59.]

[In debt *qui tam* against a bailiff for extorting illegal fees in executing a *f. fa.*, if the plaintiff sets out the judgment on which the writ was founded, he must also prove it. 2 Blk. 1101.]

### (F 2.) Remedy for his fees.

By those statutes the sheriff has a right to the fees allowed, and may maintain *assumpsit* upon a promise of payment. R. Mo. 468. Cro. El. 654. R. cont. 2 Cro. 108.

So, he may have debt. Adm. Cro. Car. 287. R. 1 Sal. 331. Dub. Cro. El. 335. R. Noy, 76. Poph. 173. R. Latch, 19. 52. R. 1 Rol. 598. l. 35. Mo. 853.

[An action brought on the 29 El. c. 4. for fees, must be brought by the sheriff himself, and not by his bailiff. 2 T. R. 155.]

But he cannot take a bond for his fees. R. Cro. Car. 287.

Nor, can he refuse to do execution till his fees paid. R. 1 Sal. 330.

And, if he refuses, he may be indicted for extortion. 1 Sal. 330, 331.

Yet the court will not grant an attachment against him. 1 Sal. 331.

Yet by the st. 28 El. 4. that act does not extend to fees to be taken for execution in a city or a town corporate.

And therefore, upon execution out of an inferior court in a city or borough, the sheriff, bailiff, &c. shall not have the fees allowed by that act. R. Cro. Car. 287. R. 1 Sal. 331. 5 Mod. 97. R. Noy, 76. Poph. 173.

So, it does not extend to an execution in a real action; and therefore the sheriff shall not have fees upon an *habere facias seisinam*, or *possessionem*. R. 1 Sal. 331.

But this is now remedied by the st. 3 Geo. 15. Vide ante, (F 1.)

So, it does not extend to execution upon voluntary engagements; as, a statute-merchant, recognizance. R. 1 Sal. 332.

But for execution of a judgment in a superior court, the sheriff, &c. shall have the fees allowed by the statute, though execution be done within a city or corporation. R. Cro. Car. 287. R. 1 Sal. 331. R. Noy, 76. Latch, 17. 51.

So, if a city, &c. be a county of itself, and execution be done by the sheriffs of the same county, they shall have their fees. Noy, 76. Poph. 173. Semb. Latch, 52.

So, a bailiff of a franchise shall have his fees. 5 Mod. 97. Vide st. 3 Geo. 15. Dub. Latch, 19. 52.

[The sheriff may retain his poundage out of money levied by *levari*, on an outlawry, ordered to be restored on giving security. Semb. Bunb. 305.]

[Sheriff may retain for his poundage, though there is no actual levy. Parker, 177.]

[And questions relating thereto are determinable on motion. Ibid.]

[On a writ of false judgment, if sheriff's fees are not paid, he may execute a writ *de executione judicii*. Barnes.]

[A judgment by default, in an action for non-payment of sheriff's poundage, brought by the plaintiff in an execution, will not be reversed,  
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because the declaration does not aver the amount of the poundage, and notice thereof given to the defendant. 2 H. B. 312.]

[The sheriff selling under a *venditioni exponas*, is not entitled to deduct any thing either for extra expences or poundage, or to return such a deduction; he must make a return of the whole sum produced by the sale, when the court order it to be paid over, deducting poundage; and he must move the court for an extra allowance to which he may be entitled. 1 Price, 205.]

[Where on a *mandamus* to admit a freeman, the party pleads, and damages and costs are given to the prosecutor, he is entitled to levy in execution for the sheriff's poundage also, under 43 Geo. 3. c. 46. 2 Smith, 8.]

[Where two extents issue into different counties, the sheriff who completes his levy, is entitled to full poundage. 1 Anst. 279.]

[Two extents issued into different counties, and both sheriffs levied to the whole amount; upon the levy of the one, the debt was paid; The sheriff is entitled to his full poundage. 2 Anst. 358.]

[Two extents issued into different counties for the same debt; both sheriffs seized goods; the debt was paid to the one before a *venditioni exponas* issued to either; he shall have the whole poundage. 3 Anst. 717. But where the debt was paid the officers of the crown immediately, although by compulsion of the one levy, the poundage was apportioned between the sheriffs. 3 Anst. 718.]

[Two extents having issued against A., and an extent in aid into another county against B. for the same sums, B. paid the whole debt, giving notice to the sheriff to retain the money, till the legality of the extent in aid was tried. Afterwards A. paid part of the money to B., in consequence of arrangements amongst themselves. The sheriff who took the inquisitions against A., is not entitled to any share of the poundage. Wightw. 116.]

### [(G a.) Proceedings by and against.]

[An inquisition made by a sheriff's jury, for the purpose of ascertaining who was entitled to the property of goods taken under an execution, is not admissible evidence even against the sheriff, in an action of trover, brought by the party in whose favour the inquisition was found. 2 H. B. 437.]

[The return to a writ made by the sheriff is at his peril; if false, he is liable, though made in pursuance of an inquisition taken by him. Such inquisition, however, will protect him from vindictive damages, since it proves that his return was *bonâ fide*. 3 M. & S. 175.]

[The court have no jurisdiction over an inquisition taken by the sheriff for his own indemnity. 6 T. R. 88.]

[In debt for an escape against the sheriff, the indorsement on the writ of *non est inventus*, is sufficient evidence that it was delivered to the sheriff. Cowp. 63.]

[A sheriff selling goods, impliedly undertakes that he does not know that he has no right to sell them. 5 Taunt. 657.]

[An action does not lie against the sheriff upon a promise to execute a bill of sale to the plaintiff's nominee. Cowp. 406.]

[The offices of the agents for the under-sheriffs of London, Middle-

sex, and Surry, are considered as the offices of the under-sheriffs. Doug. 420.]

[Service of a rule to return a writ on the under-sheriff's agent in town, is not good service. Doug. 420.]

[Where the sheriff seizes goods under a *f. fa.*, and keeps possession at the defendant's desire, to enable him to pay the debt and costs without sale; the defendant, after such payment, may rule the sheriff to return the writ. 2 Mars. 330. 7 Taunt. 5.]

[If after a writ of execution is issued the matter is compromised, neither party can rule the sheriff to return the writ. 5 T. R. 470.]

[Under special circumstances the court, after hearing the prothonotary's report, to whom the matter was referred, obliged a sheriff, attached for not duly returning a writ of *f. fa.*, to pay the whole debt and all the costs incurred to the plaintiff. 1 H. B. 543.]

[The sheriff, by delaying, waives his objection to an attachment on the ground of irregularity. 4 East, 604. Infra, 907. (e.)]

[After the sheriff has returned the answer of the bailiff of a franchise, the bailiff, not the sheriff, must be ruled to bring in the body. 2 T. R. 10.]

[The only way to call on a sheriff to return a writ is by rule and process of the court. Therefore a request by the party within six months after the expiration of the sheriff's office, and a neglect by the sheriff, are not sufficient whereon to found an attachment. 2 T. R. 1.]

[A rule calling upon the sheriff to return a writ, supposes that he has been guilty of negligence; therefore it should not issue till after the day on which the writ is returnable; and though it be tested after, yet if it actually issued before that day, it is irregular. 1 T. R. 552.]

[Sheriffs in London and Middlesex must return writ and bring in body within four days. 3 Burr. 1291.]

[Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody. Held, that the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*, and the court set aside an attachment issued against the sheriff for not returning the writ. 1 Mars. 289.]

[A rule to bring in the body cannot be taken out until the day after the rule to return the writ expires. 5 T. R. 479.]

[The rule to bring in the body cannot be taken out until the time for putting in bail has expired. 8 East, 525. 2 H. Bl. 276.]

[The rule to bring in the body may be taken out on the day immediately after the sheriff has returned the writ, if the time for putting in bail is then expired. 3 Anst. 653.]

[The rule on the sheriff to return the writ expired two days after the end of the term; a rule to bring in the body taken out next day, but tested on the last day of term, was held regular. 3 Anst. 779.]

[A rule to bring in the body, tested on the day of return *cepi corpus*, though not issued till after that day, is irregular. 2 East, 241.]

[The rule to bring in the body may be served upon the sheriff the same day on which he returns *cepi corpus* to the rule to return the writ, provided the time for putting in bail has expired, but not otherwise. 4 M. & S. 427.]

[The sheriff has four days exclusive of that on which the rule was served. Lofft. 631.]

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[As well in the case of added, as of original bail, (Anon. Lofft. 159.) the sheriffs cannot be attached for their not having justified in time, unless they have been excepted to. 8 T. R. 258.]

[To found an attachment against the sheriff, the service must be at his office, not upon his servant at his house. Anon. Lofft. 301.]

[An attachment against the sheriff for not bringing in the body, can only be granted upon an affidavit of service of the rule; and no evidence, however strong, that the sheriff had received the rule will supply the want of it. 2 Mars. 251.]

[Where the rule to return the writ expires on the last day of term, an attachment may be moved for at the rising of the court on that day. 11 East, 591.]

[Where the defendant was rendered in discharge of bail, and the defendant's attorney called to give notice of render that night, but finding no one in the way, saw the plaintiff's attorney the next morning, and then gave notice. Held, that an attachment against the sheriff moved for on that day, although the instructions to the counsel were given before the notice, was irregular, and the attachment accordingly set aside. 2 Smith, 242. (the page in the original is marked 243.)]

[Rule as to the time for moving for and issuing of an attachment for not bringing in the body. 1 B. & P. 312.]

[If bail are justified at any time before motion for an attachment against the sheriff, though after the rule to bring in the body has expired, it is sufficient to prevent it. 1 H. Bl. 9.]

[On payment of costs, justification of bail was permitted on the day after the expiration of the body rule. 1 B. & P. 325.]

[The rule of K. B. Trin. 33 Geo. 3. 5 T. R. 368. allowing bail to render their principal after the sheriff has been ruled to bring in the body without justifying, extends to the sheriff, and likewise to the case where the rule has been granted before bail have been put in, or justified, and after the time for putting in or justification has expired. 7 T. R. 527.]

[A surrender by the bail on any part of the last day allowed for justification, is sufficient to preclude an attachment against the sheriff. 8 T. R. 464.]

[If the defendant is surrendered, though after the rule for bringing in the body has expired, it is irregular to move for an attachment. Had the defendant perfected bail, the plaintiff could not have proceeded with his attachment, and a surrender is equivalent to perfecting bail. 2 M. & S. 562. over-ruling 8 T. R. 30.]

[Surrender of the principal before, attachment obtained, discharges the sheriff, although he has not taken a bail-bond. 1 Price, 103.]

[Where a defendant has been arrested by a wrong christian name, and the sheriff returns, "I have taken A. B. sued by the name of C. B." the sheriff is a trespasser, and the court will set aside an attachment against him for not bringing in the body. 1 Mars. 75.]

[A waiver by the defendant of an irregularity on the part of the plaintiff will not preclude the sheriff from insisting on it. 1 H. B. 80. Id. 106.]

[If after an attachment against the sheriff, bail is put in, the court will  
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set aside the attachment, provided a trial has not been lost. 4 T. R. 352. Id. n. (a).

[If an application to set aside an attachment against the sheriff for not bringing in the body, is made on behalf of the defendant, there must be an affidavit of merits; if on behalf of the sheriff, though it cannot be expected that he should swear to merits, the court will require an affidavit that the application originated from him, and was not made in collusion with the defendant in the cause. 7 T. R. 239.]

[The sheriff can only be discharged from an attachment for not bringing in the body upon payment of the whole debt and costs, and not merely to the sum sworn to and costs. 7 T. R. 370. 1 H. B. 233.]

[In K. B. the sheriff is only liable to the extent of the penalty in the bail-bond for not bringing in the body; therefore an attachment against him for that cause will be set aside on payment of the penalty, or a less sum, if less is due. 3 East, 604.]

[Bail to the sheriff may set aside an attachment, upon payment of costs and putting in bail, without swearing to merits, or that there is no collusion, if it be sworn that it is made on the part of the bail to the sheriff. 3 Smith, 340.]

[As well since as before the st. 43 Geo. 3. c. 46. s. 2. the sheriff will be relieved from an attachment for not bringing in the body, only on payment of the whole debt and costs. 9 East, 316.]

[If after an attachment against the sheriff for not bringing in the body has regularly issued, bail above are put in and justified, the court will upon application, supported by an affidavit either of merits, or that the application is made on behalf of the sheriff, set aside the attachment, but not without such affidavit. 3 M. & S. 299.]

[An attachment against the sheriff issued before the time for perfecting bail has expired, will not be set aside unless the bail have been perfected. 2 H. B. 35.]

[Where the plaintiff has not been delayed, an attachment against the sheriff for not putting in bail will be set aside on the terms of paying costs and perfecting bail only. 2 H. B. 235.]

[Justification of bail was permitted after an attachment granted against the sheriff; reserving to the plaintiff all rights connected with the attachment. 1 B. & P. 334.]

[After attachment granted against the sheriff, bail will be permitted to justify on the same day, and the attachment will be set aside on payment of costs. 2 B. & P. 38.]

[The sheriff may, without justifying bail, set aside an attachment that has been moved for too early. 1 N. R. 139.]

[The bail do not justify on the day appointed, and in consequence the plaintiff in the evening of that day instructs counsel to move for an attachment against the sheriff; afterwards, and in the same evening, but after nine o'clock, notice is given that the bail will surrender on the morrow; when, but after surrender, the attachment is obtained. Held, that it could be set aside only on payment of the costs of instructing counsel. 1 Taunt. 56.]

[An attachment against the sheriff for not returning the writ was discharged, on affidavit that the defendant was not seen in the county, and that the return of *non est inventus* was made one day too late by a mistake of the clerk, who supposed it was in time. 2 Anst. 479.]

[The

[The court will set aside an attachment against the sheriff, on payment of costs, if the defendant has been rendered on the evening of the last day of the rule, and notice be given early next morning. 1 Price, 338.]

[The death of the defendant, after the sheriff is in contempt for not bringing in the body, though it abates the action, does not absolve this crime; therefore he remains liable to an attachment. 3 T. R. 193.]

[An irregularity in an attachment against the sheriff from the rule to bring in the body having been taken out prematurely, is waived by delay in applying to set it aside. 2 H. B. 276.]

[The sheriff is discharged by unreasonable delay in proceeding against him. 3 B. & P. 151. And delay arising from the defendant's proposing a compromise, is not therefore excused. 1 Taunt. 111.]

[The sheriff is not discharged by a neglect to proceed against him, unless he concludes that the business was settled, and thereby prejudiced. 1 Taunt. 489.]

[Where the sheriff has been prevented paying the debt, and proving it under the defendant's commission, from a delay in issuing the attachment; when issued, it will be set aside. 9 East, 467.]

[In Hilary term the sheriff returned *cepi corpus*; after which no proceedings were had until Michaelmas term, when he was ruled to bring in the body, and an attachment granted for neglect. The court set the attachment aside on account of the delay, and because the bail had become insolvent, and the defendant had absconded. 7 T. R. 452.]

[The plaintiff, by accepting a *cognovit*, discharges the sheriff, at least where it is conditioned for payment by instalments. 1 Taunt. 159.]

[A warrant of attorney to confess judgment, with a defeazance upon payment by instalments, discharges the sheriff. Wightw. 121.]

[Upon principles of policy, trespass *vi et armis* will not lie against a sheriff at the suit of the assignees of a bankrupt, for taking the bankrupt's goods in execution after an act of bankruptcy, but before the issuing of the commission: trover is the proper remedy, in which the jury cannot, as they might in trespass, give vindictive damages. His selling them after the commission has issued, and notice not to sell given by the provisional assignee, cannot make him a trespasser, since a sale is an act of conversion and not of trespass. 1 T. R. 475.]

[If separate actions be sued against the sheriff and his bailiff for penalties under st. 32 Geo. 2. c. 28. proceedings will be stayed, upon payment of one penalty and the costs in one action. 2 T. R. 512. 712.]

[It seems that the sheriff and his bailiff cannot be sued jointly under st. 32 Geo. 2. c. 28.; and that the plaintiff must choose between them. 2 T. R. 712.]

[A bailiff is bound to make affidavit of service of process, when required. 1 Blk. 432.]

[An arrest by a bailiff, whose name has been inserted in a warrant by the officer to whom it was addressed, after it had been signed and sealed by the sheriff, is void, though addressed to that officer, and all other the sheriff's bailiffs. 6 T. R. 122.]

[Though a sheriff's warrant directed to four, and each of them may be

be executed by two or by three (Cro. Eliz. 913.); yet if words of restriction are used as to the four, "jointly and not severally," they must act together. 2 Taunt. 161.]

[A sheriff's officer is punishable under the Lords act, 32 Geo. 2. c. 28. s. 11. for abusing the process of a court at Westminster, only by that court out of which it issued. 2 B. & P. 88.]

[It is exclusively the duty of that sheriff to whom a writ has been directed and delivered, and by whom it is executed, to make the return thereto; and if he goes out of office before the return day, to hand over the writ and return to the new sheriff, to be by him returned into court. 4 East, 604. 1 Smith, 286.]

[By the true construction of 20 Geo. 2. c. 37. a sheriff is not liable to be called upon to return process, unless within six lunar months after the expiration of his office; and the day on which he goes out of office, is to be reckoned part of the six months. Dougl. 463.]

[Rule for ruling a sheriff, gone out of office, to bring in the body. K. B. Trin. 31 G. 8. 4 T. R. 379.]

[The late sheriff may be attached for not bringing in the body, though he was ruled on the last day of term preceding the vacation in which he went out of office. 1 H. B. 629.]

[A *distringas* to the new sheriff to compel the old one to sell goods taken under a *fi. fa.*, but which he returned, remained in his hands for want of buyers, will not lie where it appears that he has no longer possession; the remedy is by action for parting with them. 15 East, 78.]

[That sheriff alone is liable for the escape of a prisoner, in whose custody he was at the time of escape; not therefore the new sheriff for an escape in the time of his predecessor, though he came into office before the day the writ under which, &c. was returnable. 4 East, 604. 1 Smith, 286.]

### (G b.) Sheriff's account.

(G 1.) When it shall be made, and of what things.

By the st. 51 H. 3. de scacc. all sheriffs, &c. shall make account to the treasurer and barons of the exchequer, and shall come to the *profer* in the exchequer the Monday after Michaelmas, and the *utis* of Easter, to pay their farms, rents, and issues, &c. and shall bring at the same time such monies as they have received of the summons of the exchequer, and other the king's debts.

And give a recognizance, and make oath to make their account. Mad. 642. 662. Vide ante, (A 2.)

And a writ of summons from the pipe, issued before Michaelmas and Easter, whereby the sheriff was commanded *quod sit ad scaccarium in cras. S. Mich. et cras. clausi Pas. et haberet ibi quicquid debet de veteri firma vel nova, et debita subscripta.* Hale, Sh. Acc. 49.

By the st. de Rutl<sup>d</sup>, 10 Ed. 1. (which was an act of parliament, 2 Inst. 551. 4 Inst. 114.) the body of the county shall be written in an annual roll *per se*, and read every year upon the accounts of sheriffs; the remanents of the fermes of the same shires shall be written *post terras datas* in the annual rolls, and the sheriffs shall be charged therewith. H. Sh. Acc. 65.

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In the same annual rolls shall be written the fermes of the sheriffs, the profits of counties, the fermes of serjeanties and assarts, the fermes of cities, boroughs, towns, and other fermes, whereof answer is made yearly in the exchequer. H. Sh. Acc. 65.

And, also all debts determined, all gross debts separate, and all other debts that seem to be clear. Mad. 654. H. Sh. Acc. 65.

If the sheriff does not make his profer as he ought, a writ goes, commanding him to make it. Mad. 645.

The annual revenue, for which a sheriff should principally account, was fixed or casual; the fixed was called the *corpus comitatús*; the casual, *proficuum comitatús*, which, being in ferm to the sheriff, were called *firma corporis comitatús*, and *firma de proficuis comitatús*. Hale, Sh. Acc. 34. Mad. 223. 651. 2 H. 7. 6. b.

The fixed annual revenue contained; 1. The rents of the tenants of the demesnes of the king; 2. Gross fermes of lands, not parcel of the county, let to farm to cities, boroughs, or particular persons, or reserved after the ferm of the county was ascertained; 3. Common fines upon towns for beaupleader, for suit, ward, not attending the tourn, &c. reduced to a certainty; 4. Arrentations of assarts in wastes and forests ascertained by justices in eyre; 5. *Crementum comitatús*, or improvements of the king's rents. Hale, Sh. Acc. 35, &c.

Some of these and several other rents, to be collected by the sheriff, were written *sub nomine vic.*, and called *vicontiel* rents, and composed the ferm *corp. comitatús*. H. Sh. Acc. 37, &c.

The ferm *de proficuis comitatús* principally comprehended, 1. The fines, issues, amerciaments, and other profits of the county-court; 2. Of the tourn and leet of the sheriff; 3. Of the hundred or wapentake-court. H. Sh. Acc. 43, &c.

These fermes were paid in blanch money, (viz. reduced to the standard and *dealbat.*) or in *numero*. H. Sh. Acc. 24. 54.

Though the *debet* of a sheriff could not be known, till his account finished, yet an estimate was usually made of the annual revenue paid by him, and this sum was paid upon return of the writ of summons of the pipe at Michaelmas and Easter, which are called the profers of the sheriffs. H. Sh. Acc. 51. Mad. 648. 644.

And these profers are continued, but repaid, if nothing appears due from the sheriff upon the end of his account. H. Sh. Acc. 52.

By the st. 2 & 3 Ed. 6. 4. every sheriff, after he, his deputy, or attorney, is sworn to account for the profits of his office, shall deliver to such of the lord treasurer, chamberlain, chancellor, and barons, as shall be present, rolls of parchment, containing the sums he hath levied, or might have levied, as part of his ferm called *vicontiels*, or any other ferm charged to him out of the court of exchequer, of whom, for what lands, and for what cause levied.

By a rule 6th July 1650, it was ordered, that the clerk of the pipe, secondaries, and sworn clerks of the said office, shall set forth, in the subsequent annual rolls, the particular rents, as far as they can discover, &c. which make up the fermes charged in gross sums, and distinguish how much of them have been and are to be answered. H. Sh. Acc. 89. 94.

So, by the st. 13 & 14 Car. 2. 21. s. 4. the remembrancers, &c. shall write true copies of seizures and inquisitions, certified to the respective offices,

offices, for the engrosser of the great roll, &c. that process may issue for levying the same, &c. and they shall forthwith certify to such engrosser of the great roll all such debts as any sheriff shall be charged with by his return to the barons, on any *feri facias*, *levari facias*, *capias*, or other process, and all fines and amerciaments, set in the court of exchequer on any sheriff, &c. that they may be charged in the sheriff's account, &c. on pain of 40*l*.

(G 2.) Of what things a sheriff shall not be charged.

But by the st. of Rutl<sup>d</sup>, 10 Ed. 1. in the remanents, the liveries and arms assigned shall be allowed, and other allowances (if the sheriff have had any) of the issues of bailiwicks by our writs. Mad. 239. 248. 650.

But the treasurer and barons shall have view, &c. and certify the chancellor of the due allowances to be made, and writs of allowance shall go according to such certificates.

In the account as to new debts, nothing shall be put in the annual roll, but debts separate, or found in the original; but of dead fermes and desperate debts, another roll shall be made, called *rotulum comitatús*. H. Sh. Acc. 64.

And all debts, to which a sheriff may return, that the debtors have nothing in his bailiwick, nor had when first charged, or that the debtors be not found, shall be estreated into a roll, and delivered to circumspect men, who shall inquire thereof, as by the treasurer and barons shall be provided.

After this statute, the annual rents, which compose the ferm *corpus comitatús*, were examined, and abatement was made in the ferm of the sheriff, in respect of rents issuing out of lands granted by the king, and this was styled *remanentia firmæ post terras datas*. H. Sh. Acc. 66.

And the account was not made as before *de firma corporis comitatús*, but *de remanent firmæ post terras datas*. H. Sh. Acc. 66.

And out of the annual roll were also omitted, *firmæ mortuæ*, viz. that could not be levied, and debts separate. H. Sh. Acc. 67.

By the st. 5 R. 2. 19. if accomptants, examined by the barons on oath, if they can answer the king any thing, say, they cannot, they shall be discharged from other account.

And because, by subsequent grants, the rents, of which the ferm of a sheriff consisted, were abated, whereby the sheriff could not raise his ferm without grievance to the people, by the st. 1 H. 4. 11. it was enacted, that the sheriffs shall account in the exchequer, and have allowance, on their oaths, of the issues of their counties in all times to come. H. Sh. Acc. 74.

But by the st. 4 H. 5. 2. these allowances on oath were restrained to things casual. H. Sh. Acc. 76.

So by the st. 34 H. 8. 16. sheriffs were to be charged on their accounts only with such sums as they might levy, and should have allowance not only for their charges in the diets, and charges of the justices of assize, but also their expences about the executing their offices. H. Sh. Acc. 78. Recital in the st. 2 & 3 Ed. 6. 4.

But by the st. 2 & 3 Ed. 6. 4. this act was repealed; yet it was thereby enacted, that sheriffs should have such talies of reward and other allow-

allowances as they had before the making the said act, or account according to the said act, at their election. H. Sh. Acc. 79.

And in counties, where no tallies of reward have been granted by the king, the sheriffs shall have allowances for their charges in the diet of the justices, or by other means, as shall be in a bill delivered on oath, without warrant or tally. H. Sh. Acc. 79, &c.

And shall be discharged of all fermes, goods, profits, casualties, and sums of money, as they cannot levy or come by. H. Sh. Acc. 80.

And have deduction and allowance of all sums, where the possessions, out of which the vicontiels were leviable, are come to the king's hands, &c. And the lord treasurer and barons may do this without warrant.

Since this statute all sheriffs have waived their tallies of reward, and have in their accounts taken the benefits allowed by the st. 34 H. 8. 16. and 2 & 3 Ed. 6. 4. Hale, Sh. Acc. 82.

And have discharged themselves of their vicontiels, the *fermes de remanent. comitatús*, all *fermes de proficuis comitatús* (where the profits did not exceed the charge), the casual profits and other things which they could not levy. H. Sh. Acc. 82, 83.

And such discharge was made upon the oath of the sheriff, that he could not levy them. H. Sh. Acc. 83.

By a rule 6th July 1650, so much of the fermes as cannot be explained by particulars, &c. and such particulars as have not been answered in forty years last, and are become illeviable, shall be put out of the annual roll of the accounts of sheriffs, &c. H. Sh. Acc. 95.

And by the st. 13 & 14 Car. 2. 21, s. 4. no sheriff shall be charged to answer in account any illeviable seizure, farm, rent, or debt, or where the process doth not express of whom, or of what lands, &c. or for what cause they are to be levied.

And all other dead farms and seizures, desperate, illeviable, and unintelligible debts, shall be left out of the great roll and sheriff's charge.

So, by the st. 3 Geo. 15. the lord treasurer and barons, or any two of them, as oft as they see fit, on request of the sheriff, &c. may call the treasurer's remembrancer, clerk of the pipe, and such other officers as they think fit, and cause them to bring before them an account of the rents and certainties, written out yearly in process to the sheriff, &c. and upon examination reduce and establish the sums with which the sheriff shall stand chargeable, &c. and make orders pursuant thereto, to be entered on record in the several offices, and the sums so settled shall be the profers of each county, and the rolls of profers shall be made conformable thereto.

### (G 3.) How enforced to make his account.

A sheriff ought to make his account in person, or by attorney. Mad. 658.

And his account shall be annual, and in a regular manner. Mad. 629.

But by the st. 3 Geo. 15. no sheriff or under-sheriff shall be taken into custody by any officer of the court of exchequer, for not being apposed upon any process for not finishing his accounts, or for any contempt relating to his account, but by writ under the seal of the said court, or by warrant, signed by one of the barons, to be executed by the marshal of the said court, or his deputy, and particularly expressing the name of the sheriff, &c. and his offence.

### (G 4.) How

(G 4.) How the sheriff shall be discharged by *quietus*.

When the sheriff has finished his account, he shall have his *quietus*.

By the st. 21 Jac. 5. and 13 & 14 Car. 2. 21. s. 8. when a sheriff, on passing his accounts, shall have his *quietus est*, he, his heirs, executors, lands, goods, &c. shall be absolutely discharged of all monies by him levied, though pretended not to be accounted for, or any other pretence notwithstanding, unless questioned, and judgment against him for the same in four years after his account or *quietus*.

And the officer, by whose default any process is sent out against him, &c. shall forfeit 40*l.*, &c.

By the st. 3 Geo. 15. if any officer, &c. retard a sheriff in passing his accounts, by wilful absence, &c. or, upon payment or tender of fees, shall neglect to inrol, make out, sign, and deliver his *quietus* in due time, he shall make such recompence as the barons shall direct, on complaint in a summary way, &c.

## (G 5.) Charge of his patent and account.

By the st. 3 Geo. 15. the several officers of chancery, exchequer, &c. claiming any fee from any sheriff, under-sheriff, &c. for making out his patent or commission, the *dedimus* to swear him, the entering the recognizance, the making out and return of his process, his appeal, passing his accounts, *quietus*, or other matter concerning the sheriffalty, may receive the several fees therein specified, and no other, on pain of 5*l.* to the party grieved, and treble the sum taken above the just fees, and treble costs, to be awarded by the court of exchequer, on proof of the offence, in such summary way as to them shall seem meet.

Vide more concerning Sheriff in County, (B 1, &c.)—Dignity, (B 5.)—Justices of Peace, (D 6. 8.)—London, (G.)—Pleader, (2 W 25.)—Bent, (D 8.)—Return, (F 1, &c.)

## VISITOR.

## (A) By whom visitation shall be made.

(A 1.) By the king. p. 545.

(A 2.) How he visits.—By his chancellor. p. 545.

(A 3.) By commissioners. p. 545.

(A 4.) By a patron. p. 546.

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(A) By whom visitation shall be made.

(A 1.) By the king.

By the antient law of the realm, the king has power to visit and reform all abuses in the church. Dav. 4. 2 Rol. 230. l. 7.

And therefore, all free chapels, of the king's foundation, are visitable by the king, and not by the ordinary. 2 Rol. 230. l. 17.

So, all hospitals of the king's foundation. 2 Rol. 230. l. 17.

And all donatives. 2 Rol. 230. l. 20.

So, the king may visit the universities. R. in Privy Council, 12 Car. 1. 2 Rush. 327.

So, though the king appoints governors of an hospital, school, &c. he may afterwards visit if the governors are not made visitors by express words. Eq. Ca. 182.

So, by the st. 25 H. 8. 21. archbishops or others shall have no authority to visit any college, hospital, &c. before exempt from their visitation, but visitation shall be by the king, &c.

But by the st. 31 H. 8. 13. all monasteries, colleges, hospitals, &c. thereby dissolved, and all churches, &c. belonging to them, though before exempt, shall be thenceforth within the visitation of the ordinary, or of the king, &c.

So, where the king and a subject join in a foundation, the king shall visit; for the king is founder. 2 Inst. 68.

(A 2.) How he visits.—By his chancellor.

The visitation of the king's free chapels, hospitals, or donatives, shall be by his chancellor. F. N. B. 42. A. Dav. 46. b. 2 Rol. 230. l. 17. 20. 45. Co. L. 96. a.

And if any other visits them, a prohibition lies. Reg. 40. b.

(A 3.) By commissioners.

So, the king may make visitation by special commissioners. Dav. 46. b. 2 Rol. 230. l. 24.

By the st. 25 H. 8. 21. archbishop, or other person, shall have no power to visit any colleges, hospitals, &c. exempt before the act; but the visitation shall be made by commission under the great seal to such persons as requisite.

By the st. 1 El. 1. all privileges, jurisdictions, &c. use to visit the ecclesiastical estate and persons, &c. shall be annexed to the crown; and the queen may assign commissioners, &c. to have all jurisdiction, &c. Vide in Prærogative, (D 9.)

By the st. 2 H. 5. 1. hospitals of the king's patronage and foundation, the ordinaries, by the king's commission, shall inquire of the foundation, governance, and estate of them, &c. and shall certify the inquisition in chancery.

(A 4.) By a patron.

So, if any foundation for charitable purposes be made by a subject, and no special visitor appointed, the founder and his heirs, by the common law, are visitors. 4 Mod. 124. Ca. Parl. 45. 8 Ass. 29. Eq. Ca. 180. [D. Ld. R. 8.]

As, the founder of a college or hospital, not spiritual. Ca. Parl. 46. Bro. Deposition, 10. 2 Rol. 230. l. ult. Reg. 41. a. Noy, 91, 2. Dub. Cod. Jur. Eccl. 1148. (or 1108. *ed. ult.*) R. Carth. 93.

So, if governors be appointed, but no visitor, the governors shall visit. 2 Rol. 231. l. 2. 10. 10 Co. 31. a.

By the st. 14 El. 5. if an hospital be founded, and no visitor appointed, the founder shall visit during his life.

So, by the st. 39 El. 5. where *maisons de Dieu*, &c. are founded by charter.

So, the patron or founder of any eleemosynary corporation. Ca. Parl. 45.

So, if a common person be founder, though the king afterwards gives to the same corporation greater possessions. 2 Inst. 68.

Or, translates a chauntry, founded by a common person, to a monastery, &c. and endows it. Ibid.

So, the founder or patron of any eleemosynary foundation, and his heirs, are visitors, though the patron does not claim to be so during his life. Ca. Parl. 45.

And this visitatorial power is consequent to the patronage by the common law, not introduced by any canon or ecclesiastical constitution. Ca. Parl. 45.

So, the visitation of a donative church shall not be by the ordinary, but by the patron or commissioners appointed by him. Co. L. 344. a. Vide Donative.

[Patronage and visitation are necessary attendants upon the founder of a corporation. 2 T. R. 352. As to their delegation: a power of interpreting the statutes in case of doubt, or a special power delegated to the ordinary in particular instances, does not make a general visitor. 8 East, 221.]

[Where the corporation is eleemosynary, and no succession established, it devolves to the king in chancery. 4 T. R. 233.]

(A 5.) By the metropolitan.

So, the archbishop of Canterbury may visit the universities of Oxford and Cambridge, being within his province, *jure metropolit.* R. by the king in council, 12 Car. 1. 2 Rush. 327, &c.

(A 6.) By

(A 6.) By the ordinary.—Who subject to his visitation.

All spiritual persons generally, are subject to the visitation of the bishop or other ordinary. 2 Rol. 229. l. 10.

As, parson, vicar, &c. 2 Rol. 229. l. 35.

So, a dean, of right, is visitable by the ordinary. 2 Rol. 229. l. 25.

So, every one having *curam animarum*. 1 Mod. 12.

By the st. 2 H. 5. l. 1. as to hospitals not founded by the king, the ordinary shall inquire of the manner of foundation, estate, and governance, &c. and correct and reform, &c. according to the law of holy church, as to them belongs.

So, every spiritual hospital shall be visited by the bishop. 2 Rol. 230. l. 50. 10 Co. 31. 2 Rol. 231. l. 5. Noy, 91, 2.

So, all abbeys and priories, of common right, were visitable by the ordinary; as, to their rule and ordinary, if they were not lawfully exempted. 2 Rol. 229. l. 17. 231. l. 3.

And by the st. 35 Ed. 1. 4. the ordinary, though an abbot, prior, &c. alien, may visit a monastery, &c. subject to them in things belonging to the rule and discipline of their order.

And though the patronage of a deanery, &c. by act of parliament, be given to the king, saving to all but the bishop all rights, &c. the dean continues visitable, when the king has presented; for the saving regards the patronage and possessions only. 2 Rol. 229. l. 30.

So, if an hospital be suppressed by act of parliament, and their possessions vested in the king, the visitation of them does not thereby cease, till the incorporation of them be dissolved. 2 Rol. 229. l. 40.

So, by the stat. 14 El. 5. after the death of the founder, if no visitor be appointed, the bishop of the diocese, or his chancellor, shall visit all hospitals within his diocese, to see that they be ordered according to the statutes of the foundation; and call to account all persons for receipt of rents, &c.

(A 7.) Who not.

But the king's free chapels, hospitals, donatives, &c. were not visitable by the ordinary. Vide ante, (A 1.)

So, the king might exempt abbeys, &c. from the visitation of the ordinary. 2 Rol. 232. l. 35. 230. l. 25.

So, if the king had it in ward, the ordinary should not visit during the king's custody. Semb. 2 Rol. 230. l. 35.

So, if a rectory was appropriated to the abbot, &c. it ceased to be visitable by the ordinary. 2 Rol. 229. l. 12. Dav. 3, b.

So, if a corporation be lay, the ordinary ought not to visit, nor can visit. 10 Co. 31. a. Sutton. Dub. Cod. J. Eccl. 1148. (or 1107. *ed. ult.*)

[Whether a bishop, as visitor, has jurisdiction in matters of property in his cathedral (as the intermediate profits of a vacant prebend, divided among the other prebendaries during the vacancy), or whether they can be determined otherwise than by course of law, is a great question; but if executors and administrators of deceased prebendaries intervene, he certainly has no jurisdiction. 1 B. M. 567.]

(A 8.) How the visitation shall be made. By the bishop himself.

By Const. Othon. Leg. 22 H. 3. A. D. 1237, *Circumeant (arch. et episc.) diœceses suas temporibus opportunis, corrigendo et reformando ecclesias.* Vide Lind. Const. Oth. 56.

*In visitatione diœcesanâ, tenetur episcopus primo visitare ecclesiam cathedralẽ, deinde diœcesin.* Cod. J. Eccl. 996. (or 957. ed. ult.)

*In metropolitana, tenetur archiepiscopus suam primam ecclesiam et diœcesin visitare, deinde in singulis diœcesibus ab ecclesiâ cathedrali incipere, indeque pro libitu ad reliquas diœceseos partes transire.* Cod. J. Eccl. 996. (or 957. ed. ult.)

And visitation shall be made without commission for it under the great seal. 2 Rush. 451.

Visitation by the bishop, by the antient law, ought to be annual. Cod. J. Eccl. 998. (or 958. ed. ult.)

But because the archdeacon makes an annual visitation, by the modern law and practice, the bishop makes only a triennial visitation, *diœcesim totam tertio quoque anno visitet et procuraciones accipiat ut aliis temporibus visitet, ei liberum esto, modo suis impensis id faciat.* Cod. J. Eccl. 998. (or 958.)

By canon 60. A. D. 1603, confirmation shall be at the bishop's visitation every third year.

(A 9.) By the archdeacon.

*Visitationem per modum scrutationis simplicis tanquam vicarius episcopi archidiaconus habet de jure communi.* Lind. 49.

(A 10.) Offences inquirable at a visitation.

*Ad episcopum principaliter spectat inquirere de criminibus ecclesiasticis, ut de adulterio, usura, sacrilegio, simoniâ, et quolibet mortali peccato.* Lind. Const. Othon. 56.

By canon 109. A. 1603, if any offend their brethren by adultery, whoredom, incest, or drunkenness, by swearing, ribaldry, usury, or other uncleanness and wickedness of life, the churchwardens shall present the offenders.

So, by canon 110. if they know any to be a hinderer of God's word to be read or preached, or of the execution of those constitutions, or fautor of usurped or foreign power, by law rejected, or defender of popish and erroneous doctrine.

So, by canon 111. in all visitations they shall present the names of all who behave disorderly in the church, or, by ringing, walking, talking, or other noise, hinder the minister or preacher.

[The visitor may deprive a prebendary for incontinency. 1 Wils. 206.]

(A 11.) By what means inquiry shall be made.—By presentment.

Antiently such persons as the ordinary selected were cited to make information, upon oath, *de moribus parochianorum* within their district. Cod. J. Eccl. 1000. (or 960. ed. ult.)

Afterwards a citation was granted against 4, 6, or 8 *juxta amplitudinem*

*dinem parochiarum, quod compareant &c. super inquirendis ab eisdem visitationem nostram, &c. concernen. veritatem quam noverint dicturi, &c.,* who by the canon law are styled, *Testes Synodales.* Cod. J. Eccl. 1000. (or 960.)

And by the Const. of Boniface, 45 H. 3. A. 1261. *laici, ubi de subditorum peccatis et excessibus. corrigendis per praelatos et iudices ecclesiastic. inquiritur, ad præstand. de veritate dicendâ jurament. per excommunicationem, si opus fuerit, compellantur.* Lind. 109.

Afterwards, at the time of the reformation, and before, presentment was made by the churchwardens alone, or with two, three, or more parishioners. *Fide dignis* (who since are called side-men, or assistants), Cod. J. Eccl. 1000. (or 960.)

And by the canon 1571, *æditui adulteros, fornicarios, &c. in episco. porum et archidiaconorum visitationibus patefacient.* Cod. J. Eccl. 1000. (or 960.)

And therefore, the bishop or archbishop, before his visitation *has œconomos ad comparend. in eorum visitatione vocare solent, eisq̃ue articulos ministrare, ac eos de fidelit. super eisdem inquirend. et de compertis præsentationem exhibere, juramento corporali onerare.* Ought. Ordo Jud. 228.

By canon 26. A. 1603, churchwardens or side-men having taken their oaths to present, &c. who shall incur perjury by neglecting or refusing to do so, &c. shall not be admitted to communion.

The oath of churchwardens was at first *ad patefaciend.* what they knew to be bad *in rebus et personis*; but articles were delivered to them, and they were sworn to make presentment upon them. Cod. J. Eccl. 1000. (or 960.)

But if an oath is required to present according to articles delivered, where any articles are not within ecclesiastical jurisdiction, a prohibition goes; for the oath required ought to be only, to present such articles as to their knowledge were presentable by the ecclesiastical laws. Cod. J. Eccl. 1001. (or 261. edit. ult.)

So, a presentment *quod A. commisit adulterium, &c.* is insufficient without saying *cum quâ.* Ought. O. J. 229.

#### (A 12.) By inquiry *ex officio.*

So, a bishop or archdeacon, *ex famâ publicâ vel relatione person. fide dign.*, having notice that any has committed a notorious crime, or is suspected *de opinione erroneâ aut perversitate obstinatâ*, may cause him to be cited *ad comparend. personaliter coram eo in loco solito judiciali articulis, &c. præsertim* to the crime specified, *sibi objiciendis responsur.* Ought. O. J. 215.

#### (A 13.) By promotion or accusation of a stranger.

So, if there be no presentment, nor inquiry *ex officio*, *qualibet persona* (able to pay costs) *habet interesse judicis officium implorare et voluntarie promovere.* Ought. O. Jud. 225.

#### (A 14.) By a special visitor.

So, upon the foundation of any corporation aggregate for a charity, the founder may constitute a special visitor. Co. L. 96. a.

As, upon the foundation of any college, or hall in an university.

Or, hospital, free-school, &c.

[No particular words are required to create a visitor; it is sufficient if the founder's intention appears. 3 Atk. 662. 1 Vesey, 78. 2 Vesey, 327.]

[The visitatorial power may be divided. Ibid.]

[Governors may be visitors, though the legal estate is vested in them; but not when they are to receive the revenue. Ibid.]

[The founder may appoint a special visitor, for a particular purpose, and no further; he may appoint a general visitor, and yet appoint inferior particular powers to others in the first instance. 1 B. M. 158.]

And where there are such special visitors, governors or overseers, by the st. 39 El. 6. they are not subject to the commissioners for charitable uses.

[If a college has, by charter, particular powers as to a school; as, to remove the master, &c. chancery will not interfere in such matters, though they are not appointed general visitors; but as to management of the revenue, it will. 2 Vesey, 505.]

If a bishop, by the designation of the bishop of such a see, be appointed visitor, that extends to all bishops of the same see; as, if the statute of a college say, *episcopus Eliensis sit visitor*. Semb. F. g. 312. 380.

(A 15.) What authority he shall have.

If a special visitor be appointed, he has a general authority to inspect, that the college, &c. be governed according to the laws and statutes of the founder. 4 Mod. 110.

And may make visitation for redress of grievances. 4 Mod. 109.

[But a visitor can only decide private disputes between the members of the college, and not a suit by third persons against the whole body. Cowp. 378.]

[So, where an estate is in the college, and they are to act in a trust, the visitor cannot meddle in a matter which is the subject of such trust. Id. ibid.]

So, though the statutes of a college say, that he shall visit *de quinquennio in quinquennium semel*, yet he may at other times hear appeals, remedy upon complaint, &c.; for his general authority shall not be restrained but by negative words. Semb. 4 Mod. 109. Ca. Parl. 42.

So, a visitor has authority, upon refusal to admit, as well as upon ouster of, a fellow, &c. of a college. 4 Mod. 369. Skin. 13.

So, a visitor has authority as incident, to deprive. 4 Mod. 110. Ca. Parl. 43. D. Ld. R. 9.

[Where, by the rules of the founder, the visitor must, in order to remove, have the consent of the seven senior members of the foundation, though he may have suspended some of the seven, their consent is essential to the removal. R. Ld. R. 5.]

[And the giving him the power expressly of depriving, with the concurrence of other persons, does not take away or affect his incidental power to deprive of himself. D. Ld. R. 9.]

To proceed upon a grievance done in the time of his predecessor. R. Skin. 13.

[If there is a visitor of a college, his authority extends to fellowships and scholarships, there to be placed by a subsequent charity. 3 Atk. 662. 1 Ves. 78.]

[Though

[Though the founder has given a college a visitor, yet, as to a separate benefaction given them in trust, they are subject to the jurisdiction of chancery as trustees. 1 Ves. 462.]

[Subsequent benefactions may be put under the power of the visitor, or not, at the will of the donor. Ibid.]

[A party's answering to an appeal before the visitor, does not give him jurisdiction, if he has it not otherwise. Ibid.]

[Visitor can judge only according to the statutes of the college. Ibid.]

[Therefore in cases in which the visitor cannot give a remedy, the relief belongs to the king's courts of general jurisdiction. Ibid.]

[Petition to the lord chancellor, as visitor of Trinity-Hall, Cambridge, there being no heir of the founder, to declare the election of a fellow void, and to order the petitioner to be admitted; the court of king's bench having in a similar case declined jurisdiction, the lord chancellor heard the petition, and on the construction of the statute dismissed it. 2 Ves. jun. 609.]

[The founder may prescribe particular modes and manners, as to part. 1 B. M. 158. Vide 1 Bl. 51. 71. 82. 89.]

[The power of a visitor must be collected from the whole purview of the statutes considered together. Ibid.]

[Though a general visitor has incidental power, yet the founder may restrain him as to particular instances. Ibid.]

[The bishop of Ely is general visitor of St. John's College, Cambridge, except as to altering the statutes. Ibid.]

[He is visitor as to the election of fellows, as well of doctor Keton's (or the Southwell) fellows as the rest. Ibid.]

[Ingrafted or annexed fellowships (though ingrafted by indenture) are to be considered as part of the old foundation, if no statutes are given by the founder of them. Ibid.]

[A clause of distress given to a third person, does not take away the specific remedy of the injured person's applying to the visitor. Ibid.]

[The jurisdiction of a visitor, if meant to be restrained, must be expressly limited. 4 M. & S. 415.]

[A visitor cannot act in his own cause, though the acts were done in another capacity, unless expressly empowered. 2 T. R. 290.]

### **(B) Determination of a visitor final.**

So, if a visitor gives sentence, it shall be definitive; for no appeal lies to the king, or elsewhere. 4 Mod. 112. R. Dy. 209. a. R. 3 Mod. 265. Skin. 13. [Vide 1 Bl. 22. 25.]

And therefore, if his sentence or deprivation be shewn in pleading, it is not necessary to say for what cause it was; for the cause is not traversable. 4 Mod. 124. Ca. Parl. 46. 53.

So, a mandamus does not lie to restore a person deprived by him. 4 Mod. 112. 122. Ca. Parl. 47. R. 3 Mod. 265:

[Where it is doubtful who is the visitor of a college, a *mandamus* shall not go, nor has it ever been determined whether a *mandamus* lies to a visitor. 1 Wils. 266. Vide 1 Bl. 52. 71. 82.]

[If the visitor of a college in one of the universities refuse to exercise his

his visitatorial power by receiving and hearing an appeal, B. R. will grant a *mandamus* to compel him; but if he has heard and decided on it, this court has no authority to examine the legality of the judgment. 5 T. R. 475.]

So, his sentence shall not be examined in a collateral action. Cont. per three J. but Holt Ch. J. acc. 4 Mod. 113. 123.

And this judgment was reversed in parliament. Ca. Parl. 56. Skin. 447—516.

No more in a temporal than in a spiritual corporation of which he is visitor. Cont. per three J. but Holt acc. and the judgment was reversed. 4 Mod. 116. 121. Ca. Parl. 56.

[Judgment of a visitor, given as patron, is conclusive. 2 T. R. 290. Id. 351. 353.]

[And the cause of a sentence of deprivation need not be disclosed in pleading. 2 T. R. 354.]

But the power of a visitor may be qualified or restrained by the statutes of the college. Semb. 4 Mod. 120. Ca. Parl. 51. 2 T. R. 290, et seq.

So, if he, who is no visitor, attempts a visitation, a prohibition lies. 4 Mod. 110. Semb. 2 Rol. 230. l. 15. 27.

So, if a visitor be appointed by the founder of a college, that does not extend to a foundation of other fellowships added by another to the same college. Semb. 5 Mod. 422.

So, if a visitor intermeddles with a matter out of his jurisdiction, a prohibition lies. Ayl. vol. 2. Hist. of Oxford, 80. 94. Reg. 40.

So, an appeal lies to the king himself from the sentence of a visitor. Ayl. Hist. of Oxford, vol. 2. 84. 86.

### (C) How his power shall be exercised.

The power of a visitor must be regulated according to the statutes of the college or customs of the place.

If an appeal be exhibited to him, he must take it. Ayl. H. of Oxford, vol. 2. 81.

He must inhibit all proceeding against the appellant till the appeal be determined. Ibid.

He must direct the complaint, to which an answer is required, to be put in writing. Ayl. vol. 2. 95.

[He need not hear parol evidence on an appeal; it is sufficient if he receive the grounds of the appeal and the answer to it in writing. 5 T. R. 475.]

So, he must summon all concerned to appear before him. Ayl. vol. 2. 81.

And he may suspend or deprive any for contumacy; for it is requisite for the exercise of his office. Ayl. vol. 2. 80. 4 Mod. 110. Ca. Parl. 43.

So, he may administer an oath. Ayl. vol. 2. 94.

Or, require an answer upon oath. Ibid.

He ought to give convenient time for an answer. Ayl. vol. 2. 95.

And for examination of witnesses. Ibid.

[Administering an oath, 2 T. R. 348, and hearing and redressing complaints. Id. are visitatorial acts.]

He must always proceed upon a general visitation, or particular appeal, *summarie, simpliciter, et de plano sine strepitu aut figura judicii*, viz. according to mere law and right. Ibid.

[The jurisdiction of a visitor need not be exercised by common law rules; but unless the visit is general, should be by appeal. 2 T. R. 290.]

Yet the forms prescribed by the statutes must be observed. Ibid.

[He may inquire of facts committed before an act of grace.]

[He may inquire into and punish one, for a corporate act.]

[The bishop of A. and his successors, being appointed visitors, it vests in the successors, without the words for the time being.]

[If he is first appointed general visitor, and afterwards is appointed special visitor, and proceeds as special visitor, a prohibition will lie; for the crown had no further power to enlarge the visitatorial power. Fort. 298. Str. 912.]

[N. B. This judgment was reversed on error in the house of lords.]

[A general visitor cannot have a *mandamus* to help him to visit his college, nor to compel an inferior officer to do his duty. B. R. H. 212.]

#### (D) Remedy, if a visitor acts contrary to law.

But a visitor has not authority to determine matters against the statutes of the realm; for he is a private judge, who is to determine only offences against the statutes of the college where he is visitor. Semb. 4 Mod. 238. 241. 369.

[A *mandamus* lies, on his refusal to receive and hear an application. 2 T. R. 338. 5 T. R. 475.]

#### (E) If he acts without lawful authority.

So, if a visitor acts when he has no right to be visitor, a prohibition lies. 2 Mod. Ca. 367.

[If no person applies to the court, who claims the visitatorial power, except one who has long exercised it, the court will not grant a prohibition on the motion of a single fellow, who suggests that the power is in another. Andr. 258.]

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### UMPIRE.

Vide ARBITRAMENT, (F).

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### UNCORE PRIST.

Vide PLEADER, (2 X 5.)

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### UNDER-SHERIFF.

Vide PLEADER, (2 S 21.)—VISCOUNT, (B 1.)

UNION.

## UNION.

### Union.

As to the union of churches, by whom it shall be made, and the effect of it, vide in Advowson, (F 1, &c.)

As to the union between the kingdoms of England and Scotland, vide in Scotland, (D 1, &c.)

As to the union of Wales with England, vide in Wales, (A 1.)

The usual union of kingdoms or states consists in the union of sovereignty, of name, of language, of laws, and occupations.

*Si uniantur duo populi, non amittentur jura, sed communicabuntur.*  
Gro. de J. Bel. & Pac. l. 2. c. 9. s. 9. Cont. 4 Inst. 347.

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## UNITY.

Vide DISMES, (E 9.)

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## UNIVERSITY.

(A) Universities; what are, [and their general privileges.] p. 554.

(B) Cambridge; the privileges. p. 555.

(C) Oxford; the privileges. p. 555.

(D) School and schoolmaster. p. 556.

(A) Universities; what are, [and their general privileges.]

In the kingdom of England there are only the two universities of Cambridge and Oxford.

*Universitas* imports the incorporation of the professors of all sciences in a body politic. Dr. Ayliffe, 2.

And frequently is used for the place in which those professors reside for their studies. Dr. Ayliffe, 2.

The word was used in such sense in the time of Rich. 1., John, and most part of the time of H. 3. Dr. Ayliffe, 2.

The king may make a university.

And may make it without the consent of the ordinary. 2 Keb. 65.

[The corporations of universities are lay-corporations, and the crown cannot take from them any rights they have by charter or prescriptive usage. 3 B. M. 1647.]

[The

[The interpretation put by the universities upon their own statutes, is conclusive. 6 T. R. 89.]

[The entry at Stationers-hall is not necessary to entitle the universities to copies of publications. 16 East, 317.]

### (B) Cambridge; the privileges.

The antient charters of Cambridge being destroyed by the rebels, per st. 8 R. 2. nu. 11. the assise, conusance, and correction *panis, cervisie, ponder., mensur., regrator. et forestallor.*, were granted to the chancellor and scholars of the same university. 4 Inst. 228.

By st. 13 Eliz. 21. it was enacted that the university of Cambridge should be incorporated, though it was antiently a corporation. 4 Inst. 227.

That the letters patent of 3 Eliz., and all letters patent of the queen or her predecessors, should be as good and effectual as if they had been recited and confirmed by the same act. 4 Inst. 227.

That the chancellor, masters, and scholars of the same university should enjoy all manors, franchises, privileges, &c. to them granted, &c. 4 Inst. 227.

[The charter of Eliz. does not repeal the old customs and usages of the university, except in cases where they choose it; they may act partly under one, partly under the other; and an election according to usage is good, though a subsequent charter directs another mode. 3 B. M. 1647.]

[Court-leet, though antiently granted to the town, is now in the possession of the university. Semb. *ibid.*]

[By letters patent, 26 H. 8. and 3 Car. 1. it has a concurrent authority to print acts of parliament, and abridgments of them, within the university. 2 B. M. 661.]

As to the courts of the universities, vide in courts, (M).

As to the conusance of pleas there, vide Courts, (M—P 2. 4.)

[It is an offence against a statute of the university of Cambridge, to publish therein a pamphlet against the established religion. 6 T. R. 89.]

### (C) Oxford; the privileges.

So, by the st. 13 Eliz. 21, all charters and letters patent, &c. by the queen or her predecessors to the university of Oxford, as well as to Cambridge, are confirmed; the university is incorporated *de novo*, and all manors, franchises, privileges, &c. which they of right ought to have, are established. 4 Inst. 227.

The chancellor of the university is a justice of peace by prescription, as well as by charter. 2 Vent. 33.

By antient charters, they have jurisdiction *tam in laicos quam in clericos*. 2 Vent. 33.

So, by st. 14 R. 2. and 14 H. 8. confirmed by st. 13 Eliz. 21. the university has conusance of all pleas for trespass, and all complaints, misdemeanors and crimes (except pleas of freehold) *ubi scholares, servi aut ministri sunt una partium sec. statuta vel consuetudines, &c. vel sec. legem*

*legem regni ad voluntatem cancellarii ; ita quod justic. de B. R. de C. B. vel de assizis non se intromittant.* Vide Courts, (M.)

And therefore, where a scholar is party, the vice-chancellor's court shall hold plea in all personal actions *sec. legem terræ, aut morem universitatis.* Litt. 10. 1 Sal. 343.

So, if the wife or daughter of a scholar is plaintiff against another scholar who prays a prohibition ; for though the wife is not a scholar or servant, yet the defendant being a scholar, the suit ought to be in the vice-chancellor's court. R. Cro. Car. 73. Litt. 41.

So, conusance shall be allowed, where an action upon the case is brought against a college in their corporate capacity, viz. against master and fellows. R. per three J. Atkins cont. 1 Mod. 164.

But the university court shall not hold plea in an action real.

Nor, in ejectment ; for thereby possession of the freehold shall be recovered. R. Cro. Car. 88.

Nor, in trespass *quare clausum fregit* ; for the freehold may come in question.

Nor, for the penalty of a statute. Skin. 665. R. Sal. 671.

So, privilege of the university will not be allowed where the suit is for an equitable matter in chancery. R. 2 Vent. 362. Vide in Chancery, (3 X).

Nor, where a tradesman is matriculated and registered in the university as a servant to a scholar, but lives in the city, and does not attend in college as a servant. R. 2 Vent. 106.

[Conusance is not allowed for one who, though still a member, and sometimes is at Oxford, yet is a curate elsewhere, and resides there generally. 2 Wils. 310.]

[The chancellor should certify residence, and there should also be an affidavit of it. Semb. *ibid.*]

If the privilege of the university is allowed upon record in the same court, it shall be afterwards allowed upon motion in another case ; but otherwise, it must be pleaded. Sal. 450. Skin. 665.

[A college barber at Oxford, though he reside in the city, is entitled to the privileges of the university. Dougl. 531.]

[Conusance on behalf of the university may be claimed by the vice-chancellor of Oxford, during a vacancy in the office of chancellor. 11 East, 543.]

[An affidavit in support of a claim of conusance by the university of Oxford, in respect of one alleged to be now a common servant of the university, need not state that he is resident therein, or that he is matriculated. 15 East, 634.]

[By st. 17 Geo. 2. c. 40. s. 11. no person shall retail wine in either university without licence from the chancellor or vice-chancellor of Oxford, or the chancellors, masters, and scholars of Cambridge, respectively, on pain of 5*l.* But this is not to affect the privileges of the mayor, &c. of Oxford.]

#### (D) School and schoolmaster.

But by *const. Tho. Arundel in conc. Oxon, H. 4. magistri, &c. docentes in artibus aut grammaticâ pueros, &c. de materia aliqua theologicâ contra determinatâ per ecclesiam, nullatenus se intromittant instruendo eosdem,*

*eosdem, nec permittant scholares, &c. de fide, &c. disputare, ne per ordinarium gravit. puniantur.* Lind. 283.

So, by st. 23 El. 1. a schoolmaster or teacher presuming to teach contrary to this act, (viz. who absents from church for a month, or is not allowed by the bishop or ordinary of the diocese), being convict, shall suffer a year's imprisonment, without bail, and be disabled to be a teacher of youth.

And he who keeps such a schoolmaster shall forfeit for every month 10*l*.

So, by the st. 1 Jac. 4. no person shall keep a school out of the universities, except in some public or free grammar-school, or in some gentleman's house, not recusant, or licensed by the archbishop or bishop of the diocese, on pain of 40*s*. per day, &c.

So, by st. 13 & 14 Car. 2. 4. every schoolmaster of a public or private school, &c. shall subscribe the declaration therein; and if any teach, as a tutor or schoolmaster, before licence from the archbishop or bishop of the diocese, &c. or before such subscription, (but subscription, only as to his conformity to the liturgy, is now taken away by st. 1 W. & M. 8. and 5 Geo. 6.) he, for the first offence, shall have three months imprisonment; for the second the like, and forfeit five pounds.

By st. 17 Car. 2. 2. it shall not be lawful to teach any public or private school, unless he first subscribe the oath against taking up arms, &c. and frequent divine service, on pain of 40*l*.

By st. 12 Ann. 7. he shall subscribe declaration to conform, &c. have licence, &c. receive sacrament in a year before, take the oaths, and subscribe declaration against transubstantiation, and not afterwards resort to conventicle, &c. But this is now repealed by st. 5 Geo. 6.

By st. 5 El. 1. every schoolmaster, public or private teacher of children, shall take the oath of allegiance.

By st. 7 Jac. 6. he shall take it before the bishop of the diocese or ordinary in open court.

By st. 1 W. & M. 8. instead of the former oaths, the oaths thereby prescribed.

By st. 13 & 14 W. 3. 6., 1 Ann. 22. and 1 Geo. 13. he shall take the oaths of allegiance, supremacy, and abjuration.

The st. 23 El. 13 & 14 Car. 2. extend to an usher, or other assistant to a schoolmaster.

And if a suit is instituted in the ecclesiastical court for keeping a school without licence, a prohibition lies. Dub. Sal. 672. R. Carth. 464, 5.

[To the fitness of the master of a grammar-school, learning is as essential as morality and religion; therefore the ordinary may examine a candidate touching the sufficiency in the former as well as the latter. 6 T. R. 490.]

[By the canon law, as recognized in England, the licensing of masters to grammar-schools belongs to the ordinary. 6 T. R. 490.]

[A general resignation bond to the patron by the master of an ancient public school, though having a freehold in his office, is unimpeachable at law. If any corrupt purpose is intended, equity will interfere. 1 East, 391. 3 B. & P. 231.]

[The

**VOUCHER.**

[The nomination to a school is vested in the vicar and churchwardens of X., to devolve, on their neglecting to nominate, to the corporation of Y.; and on their neglecting, to return to the vicar and churchwardens. Held, that the nomination by the vicar and a majority of the churchwardens, was good. 6 T. R. 388.]

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**UNLAWFUL ACT.**

Vide JUSTICES, (M 10.)

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**VOLUNTARY BOND.**

Vide CHANCERY, (4 D 22.)

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**VOLUNTARY CONVEYANCE.**

Vide CHANCERY, (2 T 9. 16.—3 M 5.)

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**VOLUNTARY SETTLEMENT.**

Vide CHANCERY, (3 N 5.—4 H 9.)

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**VOTING IN PARLIAMENT.**

Vide PARLIAMENT, (C 26, &c.)

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**VOUCHEE.**

Vide ESTATES, (B 29.)—VOUCHER, (D 1, &c.—E—F—1, 2.)

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**VOUCHER.****(A) Voucher.**

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### (A) Voucher.

(A 1.) In what actions it lies.

Voucher lies in real actions, where the tenant vouches such an one who is bound to warranty, to defend the right against the demandant, or to render in value. Co. L. 101. b.

It lies in all real actions for recovery of land, except assise. Vide infra.

In right of a ward. 2 Rol. 744. l. 47.

In right of advowson. 2 Rol. 745. l. 3.

So, in a writ of admeasurement of pasture. 2 Rol. 745. l. 29.

But in assise the tenant cannot vouch: for it is *festinum remedium*. 2 Rol. 745. l. 21.

Nor, in a writ of entry in the nature of an assise; for it is contrary to the supposal of the writ. 2 Rol. 745. l. 25.

So, in partition the defendant cannot vouch. 2 R. Mo. 21.

Nor, in dower against the heir. 2 Rol. 745. l. 14.

Or, *quod ei deforciat* for recovery of land, claimed as dower; for it is in the nature of dower. 2 Rol. 744. l. 42.

Nor, in a *quare impedit*, for danger of a lapse. 2 Rol. 744. l. 52.

Nor, in ejectment of ward. 2 Rol. 744. l. 47.

Nor, in *scire facias* to execute a fine. 2 Rol. 745. l. 4.

Nor, in *quod permittat*. 2 Rol. 745. l. 15.

Or, writ of intrusion. 2 Rol. 745. l. 17.

(A 2.) How it shall be made.

A tenant may vouch generally without shewing cause. 2 Inst. 246.

(A 3.) When cause shall be shewn.

But he must shew cause for the voucher, when the voucher is out of the common course; as, if a man vouches himself. 2 Rol. 753. l. 10.

Or, himself and a stranger; himself and another parcener, &c. 2 Rol. 53. l. 15.

(B) Counter:

**(B) Counterplea of voucher.****(B 1.) By the common law.**

If the tenant vouched, the demandant, by the common law, might counterplead; viz. he might by replication shew, that such voucher ought not to be allowed.

As, that the vouchee, or any of his ancestors, had nothing in the tenements. Jon. 412.

That there was no such person as the vouchee. 2 Inst. 245.

That the vouchee was a villein. 2 Inst. 245.

That the vouchee was dead. 2 Inst. 246.

If issue be upon the counterplea, and at nisi prius the vouchee makes default, after a *petit cape* returned and no appearance, the demandant shall have judgment. R. Jon. 412, 13.

**(B 2.) By statute.**

But now by the st. W. 1. 3 Ed. 1. 40. in writs of possession; as, *mort d'ancestor*, *ayel*, *cosinage*, *nuper obiit*, intrusion, and the like, if the tenant vouches, there shall be a counterplea, that the tenant, or his ancestors, first entered after the death of him of whose seisin the demandant claims.

So, in *desaile*, and other actions ancestral possessory. 2 Inst. 241.

So, in dower against a stranger, right of ward, &c.; for it is possessory in its nature. 2 Inst. 241.

And it will be a good counterplea if the tenant, who vouches, is tenant by resceit, by voucher, &c. 2 Inst. 242.

If his ancestor, who abated, leased for life, and granted the reversion to A. who granted to the tenant. 2 Inst. 242.

If A. and B. abated to the use of B. who afterwards granted to A., he being a coadjutor to the abatement, will be within the statute. 2 Inst. 242.

But there is no counterplea in a *formedon*, or other writ of right in its nature. 2 Inst. 241.

Nor, if the ancestor who abated is evicted by A. who enfeoffed the tenant. 2 Inst. 242.

If the abator enfeoffs A., and takes back the estate to him and B., and then both vouch. 2 Inst. 242.

So, by the st. W. 1. 40. in writs of right, and also in possessory writs, there shall be a counterplea, that the vouchee or his ancestors never had seisin of the lands in demand, or the services of them, since the seisin of him by whom the demandant claims, and before the writ purchased, whereof he might enfeoff the tenant or his ancestors.

So, if a body politic be vouched, that the body, or their predecessors, never had seisin, &c. 2 Inst. 244.

If husband and wife are vouched, that the wife, or her ancestors, never had, &c. 2 Inst. 244.

If two are vouched, that one of them, &c. had not, &c. 2 Inst. 244.

But there is no counterplea within this statute, if the vouchee had for life or for years, jointly with another, &c.; for it may be by feoffment *de facto*, or other conveyance. 2 Inst. 244.

If he ever had seisin, though it is avoided or determined. 2 Inst. 244.

If

If the vouchee is present in court, and enters immediately into warranty, the demandant cannot counterplead. 2 Inst. 243.

If the demandant counterpleads, and the tenant waives his voucher, he may afterwards plead in abatement or bar. 2 Inst. 242.

So, if he demurs to the counterplea, and it is adjudged against him the same term. 2 Inst. 243.

But if the demurrer is adjourned to another term, it is peremptory, and there shall be judgment against the tenant. 2 Inst. 243.

### (C) Reboucher.

If the sheriff, upon the summons, returns the vouchee to be dead, the voucher afterwards may vouch another of the blood of the first vouchee.

So, if it is returned upon the *capias ad valentiam* against the vouchee, or upon the *petit cape* upon his default.

So, if the cause of voucher be traversed, where the cause ought to be shewn, the tenant may waive and vouch another immediately.

### (D) What process shall be against a vouchee.

The vouchee may appear *gratis*, and enter immediately into warranty.

If he does not appear, a summons *ad warrantizandum* goes against him. Co. L. 101. b.

If, upon the summons, the sheriff returns *nihil*, an *alias* and *pluries* go. Co. L. 101. b.

If he does not appear upon the *pluries*, a *sequatur sub suo periculo*. Co. L. 102. a.

And the tenant must procure the vouchee to appear, otherwise there shall be judgment for the demandant against the tenant for failure of his voucher. Co. L. 102. a.

If, upon summons, &c. the sheriff returns, that he has summoned, and the vouchee does not appear, a *grand cape ad valentiam* goes against him. Co. L. 101. b.

If *nihil* be returned, and still he does not appear, an *alias grand cape*, *pluries*, and *sequatur sub suo periculo*. Co. L. 101. b.

If the tenant does not yet appear, there shall be judgment against the tenant for the demandant, and also for the tenant to recover in value against the vouchee. Co. L. 101. b.

So, if the vouchee appears, and afterwards makes default, a *petit cape ad valentiam* goes against him; and upon his second default, judgment against the tenant, and for the tenant against the vouchee. Co. L. 101. b.

There ought to be nine returns between the *teste* and return of the summons *ad warrantizandum*. 2 Inst. 240.

#### (D 2.) If he be an infant.

If the vouchee be an infant, the parol shall demur till his full age: 2 Inst. 245.

If the tenant alleges him to be an infant, and the demandant says otherwise, a summons *ad visum* goes.

And, if *nihil* is returned, and he does not appear, an *alias*, *pluries*,  
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and *sequatur sub suo periculo*, and if the vouchee does not yet appear, there shall be judgment for the demandant.

If the vouchee appears, and is adjudged upon the view to be of full age, a summons *ad warrantizandum* goes against him, and upon *nihil*, an *alias*, *pluries*, *et sequat.* &c. *ut supra*.

(D 3.) If he be a foreigner.

How it shall be, if the vouchee lives out of the jurisdiction of the court where the plea is depending; as, if it is in London, a county palatine, &c. vide post, (H).

(E) Count against a vouchee.

When the vouchee enters into warranty, he stands in the place of the tenant, and the demandant counts against him as against the tenant. 2 Inst. 241.

(F) Pleas by him.

(F 1.) In abatement.

So, the vouchee may plead, as the tenant may.

As, he may plead in abatement, that the demandant took husband after the last continuance, or is outlawed, excommunicated, &c.

(F 2.) In bar.

So, the vouchee may plead in bar, all pleas *in esse*, at the time of the voucher.

(G) Judgment.

If the vouchee, after plea of nothing by descent, and issue thereupon, makes default at nisi prius, judgment may be against the tenant, or conditional against the vouchee, if he has an estate in the said county; and if not, against the tenant. R. 2 Cro. 618. Dub. how it shall be, Cro. El. 46.

(H) Foreign Voucher.

If the plea be in London, where the tenant vouches to warranty one in a foreign county, by the st. Glo. 12. and 9 Ed. 2. the demandant shall have a summons *ad warrantizandum* against the vouchee, returnable in C. B., and the record shall be removed thither by *recordare*, and the mayor and bailiffs, being required by the same writ, shall give day to the parties to appear there at the return of the writ, and, after the warranty determined, the C. B. remands the record, and the vouchee shall be commanded to answer there the plea in chief. 2 Inst. 324.

And, if the demandant recovers, the tenant shall have a writ in B. to the mayor and bailiffs to extend his land, and return the extent to B., and then he shall have a writ to the sheriff of the county where the vouchee was summoned, that he cause him to have of the land of the warrantor *ad valentiam*. 2 Inst. 324.

And

And there shall be the same remedy, where a foreigner is vouched, in Chester, Durham, courts of antient demesne, &c. 2 Inst. 325.

And, where any foreign plea is pleaded, upon which the court cannot proceed. 2 Inst. 325.

By the st. 9 Ed. 2. the statute of Glo. 12. is altered, so that the record shall be removed from London to C. B., and the justices there summon the vouchee before them, and the pleading shall be there; and if the tenant does not appear, there shall be a *petit cape* to the mayor, to give judgment against him, if he cannot save his default. 2 Inst. 325.

If the tenant vouches A. in London, and B. in a foreign county, the record shall be removed *in toto*; for process must be against all the vouchees at the same time; and when the warranty is determined, it shall be remanded *pro toto*. 2 Inst. 326.

In C. B. the justices may proceed to determine the warranty. 2 Inst. 326.

And, if the vouchee vouches over, award process against the vouchees *toties quoties*. 2 Inst. 326.

So, the tenant may be essoigned in B., and the demandant, if he makes default, nonsuited. 2 Inst. 326.

If husband and wife vouch, and the husband makes default, the wife may be received in C. B. Semb. 2 Inst. 326.

But none shall plead in chief, except in the inferior court. 2 Inst. 326.

And after warranty determined, there shall be a *procedendo*. 2 Inst. 326.

After the plea determined against the tenant in the inferior court, the tenant may surmise, that execution is sued against him, and pray a *venire facias recordum*. 2 Inst. 326.

And thereupon the justices of C. B. award an *extendi et appreciari facias* against him to the mayor, &c. 2 Inst. 326, 7.

Vide more concerning Voucher, in Abatement, (I 28.)—Courts, (O 2.)—Estates, (B 28.)—Garranty, (K 2)—Pleader, (3 Y 18.—3 A. 6.—3 E 5.)

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## USAGE.

Vide ADMIRALTY, (E 13.)—COPYHOLD, (S 1, &c.)—IRELAND, (F)—  
PRESCRIPTION, (E 2.)

Usage of parliament. Vide PARLIAMENT, (G 1, &c.)

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## [USE AND OCCUPATION.]

[An occupation by the tenant of the defendant, is, as far as respects the plaintiff in an action of use and occupation, under st. 2 Geo. 2. c. 19., an occupation by the defendant himself. 8 T. R. 327.]

[A lessor, who accepts the key of, and thenceforth holds the demised house, cannot recover against the tenant for the subsequent use and occupation. 5 Taunt. 518.]

[After a recovery against a tenant in ejectment, landlord cannot maintain use and occupation for a period subsequent to the day of the demise in the declaration on which he has recovered. But he may, for a period antecedent to that day. 1 T. R. 378.]

[A previous destruction of the premises by fire, is no defence to an action as for subsequent use and occupation. 4 Taunt. 45.]

[If lessee hold over, after notice from landlord, that in case of holding over beyond the day in the notice, he shall pay an increased rent; the holding over is an assent to the new rent, and the landlord shall recover it in an action for use and occupation. Lofft. 153.]

[Action of debt for use and occupation may be general, without detailing the particulars of the contract. 6 T. R. 62.]

[Neither the parish nor county, in which the premises lie, need be stated. 1 Taunt. 570. 5 Taunt. 25. 6 East, 348. 2 Smith, 462.]

[Where a defendant takes possession of premises, on the death of a former tenant, and an action of ejectment is brought against him, without giving notice to quit; if to defendant himself from that action, he produces a letter from the plaintiff, treating him as tenant, and claiming rent, that will be evidence of his tenancy to the plaintiff, in an action for use and occupation, though he alleged that he produced it only for the purpose of shewing that he was tenant in possession. Forrest, 120.]

## USES.

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### (A) Uses ; by the common law.

An use by the common law was a trust reposed in him who had the estate of the land, that cestuique use might take the profits. Co. L. 272. b. 2 Leo. 15. 1 And. 318.

And was not issuing out of the land, but collateral to it, and annexed in privity to the estate of the land, and the person of him who had the estate. Co. L. 272. b. 1 Co. 121. b.

And therefore, no remedy by action, or otherwise, was given for it by the common law. 1 And. 318.

All uses were *in esse*, in possession, reversion, or remainder, or in contingency, which by possibility might come *in esse* upon a contingency. 1 Co. 121. b. Vide post, (K 5, 6.)

And to every use there were two incidents inseparable ; viz. 1. Confidence in the person, express or implied ; 2. Privity in estate, express or implied. 1 Co. 121. b.

So, all inheritances local, as lands, rents *in esse*, liberties, and franchises visible and local, may be conveyed to an use. Jon. 127.

Liberty of *retorna brevium*, Jon. 118.

So, an advowson in gross, common for so many cattle. Jon. 118.

But personal inheritances, which have no relation to lands or hereditaments local, cannot be conveyed to an use. Jon. 127.

As, an annuity, office of trust which requires personal service, a way, authority, &c. Jon. 127.

Uses at the common law were, in some respects, as chattels ; for they passed by devise. 1 Co. 121. Vide Devise, (A).

So, they passed by a grant of all hereditaments ; for it was a descendible inheritance. Al. 14, 15.

A feoff-

A feoffment by tenant in tail, of an use, gave an estate only for his own life. Mo. 39.

So, by the common law an use, though suspended, might be devised; as, if A. and three others were seized to the use of A., though, as to a 4th part, the use was suspended, yet A. might devise the whole; for when he dies, his part, as to the possession, goes to the survivors. 1 Leo. 257. Vide Devise, (A).

So, if feoffees to an use were disseised, cestuique use might devise, that the feoffees enter and convey to B. 1 Leo. 257.

And to avoid mischiefs by secret conveyances to an use, by the st. 1 R. 2. 9. enlarged by the st. 4 H. 4. 7. and explained by the st. 11 H. 6. 3. an action was given to the disseisee, against the pignor of the profits, who was cestuique use. 1 Co. 123. a.

And though by those statutes it was enacted, that the writ against the pignor should not abate for non-tenure, by equity it was extended, that it should not abate by plea of joint-tenancy, or disclaimer. 1 Co. 131. a.

So, by the st. 1 H. 7. 1. a formedon was given against the pignor of the profits.

And this extends to a *scire facias* to execute an estate-tail in remainder. 1 Co. 131. b.

By the st. 4 H. 7. 17. and 19 H. 7. 15. feoffments to uses are made void, which defraud the lords of wards, reliefs, heriots, purchases made by their villeins, &c. or others, of their executions.

And by the st. 1 R. 8. 1. which was more general, all feoffments, grants, &c. by cestuique use are confirmed against him and his feoffees. R. 1 And. 29.

So, against a disseisor of his feoffees. 1 Co. 131. b.

So, grants of rent by cestuique use are confirmed. 1 Co. 131. b.

Execution by *elegit*. 1 Co. 131. b.

Grants or feoffments by him after a conveyance to him by the disseisor of his feoffees. 1 Co. 131. b.

### (B 1.) Since the statute 27 H. 8. 10.

But to avoid mischief by subtle and clandestine uses, the st. 27 H. 8. 10. enacts, that where any persons shall be seized of any lands, or other hereditaments, to the use, confidence, or trust of any other, by reason of any bargain, sale, feoffment, fine, recovery, covenant, agreement, will, or otherwise, all such persons who have such use, confidence, or trust in fee, tail, for life, years, or otherwise, or in reverter or remainder, shall be adjudged in lawful seisin and possession of the same lands, &c. in such like estates as they had or shall have in the use, &c.; and the estate, possession, &c. of him seized to the use, shall be adjudged in him that hath the use, after such quality, form, and condition as he had in the use.

And therefore, by this statute, all uses were intended to be extirpated. 1 Co. 125.

And the means, intended for the extirpation of uses, was the execution of the possession to the use.

And therefore, in all conveyances of lands, tenements, or hereditaments to the possession, shall be executed to the use.

And this, where the use is created of a rent since the statute, as well as of a rent *in esse* before. R. Dy. 362. b. Bend. pl. 299. 1 And. 51, 52.

(B 2.) What uses are executed by the statute.

But to every use executed within this statute, four things must concur; viz. 1. A person seised to the use; 2. Cestuique use *in esse*; 3. An use *in esse*; 4. Transferring of the estate out of which the uses arise to the cestuique use. 1 Co. 126. a. 136. a.

And therefore, if the estate of the feoffees was divested by disseisin, or alienation, to such as could not be seised to the first uses, those uses cannot be executed till re-entry of the feoffees, or recovery by them. 1 Co. 126.

And if their entry or action was barred, they can never be executed. 1 Co. 126. b.

So, if cestuique use had made a feoffment, the right to the use cannot be executed till re-entry by the feoffees. 1 Co. 126. a.

So, a future or contingent use cannot be executed till it comes *in esse*. 1 Co. 126. a. 136. a.

For all uses *in esse* are executed immediately, and when the contingency happens, a possibility of entry, or *quasi scintilla juris* remains in the feoffees, which will serve for such future use. 1 Co. 129. b. 130. b. Dy. 340. b.

So, no use shall be executed; which is limited contrary to the rule of the common law; as, if it is limited to A. for years, remainder to the right heirs of B.; for a freehold cannot be in abeyance. R. 1 Co. 130.

Or, if an use in remainder is contingent, and the particular estate fails before the contingency happens. 1 Co. 130. Vide Estates, (B 13, &c.)

Or, if an use is limited in tail, with a proviso that he should not suffer a recovery, &c. which is repugnant. 1 Co. 130. a. 138. a. Vide Condition, (D 5.)

If an use is limited to the heirs of B., and no particular estate to support it in the mean time. R. 4 Mod. 154. Ca. Parl. 104. Vide Estates, (B 13, &c.)

So, where a term for years is granted to the use of another, the use cannot be executed by the statute; for the grantee is not seised. Dy. 369. a. 1 And. 294. Acc. 2 T. R. 448.

So, if a termor makes a lease for a less number of years, and afterwards grants the reversion of the term, nothing passes without attornment; for the use cannot be executed by the statute, though it was upon a valuable consideration. R. 2 Jon. 217. 232.

[A devise upon trust to permit a person to receive the rents and profits, will, unless restrained, vest the legal estate in that person, which in this case it was held not to be by special provisions. And unless it be necessary for the purposes of the trust that the trustees should have the legal estate. 7 T. R. 652. 12 East, 455.]

[As to my real and personal estate, subject to my debts and funeral expences; I devise my real estates, and also my personal estate, unto A. and B. and their heirs, on the following trusts:—to the intent that they dispose of my personal estate in discharge of my debts, funeral

ex-

expences, and such legacies as I may direct; and as to my real estate subject to my debts and such charges as I may make, I devise the same to C. for life. C., not the trustees, takes the legal estate. 3 B. & P. 175.]

[Devise that the trustee should pay unto, or else permit and suffer the testator's niece to receive the rents, the legal estate was held to be in the niece. 2 Taunt. 109.]

[Where lands were conveyed to trustees and their heirs in trust, that the trustees should, with the consent of A., sell the inheritance in fee, and apply the purchase-money to certain trusts mentioned in the deed, with a proviso that the rents, issues, and profits, until the sale of the inheritance should be received by such person and for such uses as they would have been if the deed had not been made; held, that notwithstanding the proviso, the estate was executed in the trustees immediately. 8 East, 248.]

[Where trustees are to receive and pay over the rents and profits, the use is not executed, since for the purposes of the trust it is necessary that they have the legal estate. Much more where they are to exercise a discretion in applying the profits, as where they are directed to take the rents and apply them for the subsistence and maintenance of the cestuique trust. 2 T. R. 444.]

[It cannot be inferred, from a testator changing from the word "use" to "trust," that his intention is that the estate, where the former word is used, shall be executed, but not the latter. 11 East, 377.]

[Release to A. and B. and their heirs, *habendum* "to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the use of them, their heirs and assigns-for ever." The question whether A. and B. are joint-tenants or tenants in common, depends upon whether the use is executed by the statute or not; if executed, they are the former; if not executed, the latter. The use is not executed, it being a rule that where the party seised to the use and the cestuique use, are one and the same person, the statute has no operation, unless it be impossible or impertinent for the use to take effect by the common law. 4 M. & S. 178.]

[Freehold and leasehold premises are devised to trustees in fee, in trust for the use of A. (an infant) for 99 years, if he should so long live, and after that term to his first, second, third, and fourth sons, and the issue male of their bodies, for the like term of 99 years, as they shall be in seniority of birth; and in default of such issue male, then to the right heirs of the devisor. Held, that the limitation to the trustees gave them the absolute interest in the freehold and leasehold property, subject to the trusts; that none of the subsequent limitations were uses executed by the statute; that if they had been executed, A. would have taken for 99 years determinable with his life, and his first son would have taken a like estate at his death; but that all the other limitations would have been void. 6 T. R. 213.]

[Limitation by deed to the use of the husband for life, remainder to trustees and their heirs, during his life to preserve contingent remainders, remainder to the wife for life, remainder to the trustees and their heirs (not saying "during her life") in trust, to support the contingent uses and estates therein-after limited, remainder to the first and other sons, &c. The words within the inverted commas cannot be supplied, so that

that the estates subsequent to the wife's are equitable. 7 T. R. 342. 438.]

[Under a devise to trustees and their heirs, upon trust to permit a married woman to receive the rents and profits during her life, for her own sole and separate use, notwithstanding her coverture, and without being in anywise subject to the debts or controul of her then or after taken husband, and her receipt alone to be a sufficient discharge. Held, that the legal estate was vested in the trustees; for it being the testator's intention to secure to the wife a separate allowance, free from the controul of her husband, it was essentially necessary that the trustees should take the estate with the use executed, in order to effectuate that intention, otherwise the husband would be entitled to receive the profits, and defeat the very object which the testator had in view. 7 T. R. 657.]

[A. devises land to trustees to raise money by sale or otherwise, and to pay certain legacies; and wills the overplus or reversion thereof to be applied by them and the officiating ministers of the congregation, or assembly of people called Methodists, that do and shall actually assemble at L., shall from time to time think fit to apply the same; and directs that when two or more trustees die, the survivors shall nominate others. Held, the legal estate is in the trustees, and a court of law will not inquire into the trust, which may be to charitable uses or otherwise, and is not void at law within 9 Geo. 2. c. 36. s. 1. 2 Smith, 495. 6 East, 328.]

[Devise to a trustee to pay the rents to daughters (one a feme covert): the use is not executed in the daughters. 9 East, 1.]

[Devise to A. in trust to permit and suffer the testator's widow to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use of all interests of monies in the funds and rents and profits arising from the testator's houses for her natural life, if she should remain unmarried; and that her receipts for all rents, &c., with the approbation of any one of his trustees, should be good and valid, she providing for and educating properly the testator's children, and also paying two annuities thereby bequeathed, besides board and lodging to one of the annuitants; and that his children should be solely under their mother's direction until marriage, or properly provided for;—the use is executed in the devisees in trust. 4 Taunt. 772.]

### (C) How raised.

Uses are raised by transmutation of the possession; as, upon a fine, feoffment, common recovery, &c. Co. L. 271. b.

Or, out of the estate of the owner of the land; as, by bargain and sale. Co. L. 271. b. Vide Bargain and Sale, (B 1, &c.)

By covenant, upon good consideration, to stand seised, &c. Co. L. 271. b. Vide Covenant, (G 1, &c.)

[G. S. being seised in fee of lands, in consideration of a marriage to be had between him and A. S. by indenture, between himself on the one part, and the said A. S. and W. S. on the other, gives, grants, enfeoffs, aliens, and confirms to A. S. and W. S. and their assigns, lands then in his own possession, *habendum* to the use of the said A. S. for life, remainder to the heirs of her body begotten by the said G. S.,  
who

who covenants that the lands shall remain to the said uses; this is a covenant to stand seised to uses. 2 Wils. 22.]

[So, where T. K., being seised in fee of lands by lease made between him and C. K., bargained and sold the said lands to C. K. for a year, and by release dated the next day, made between the said parties, granted, released, and confirmed to the said C. K., after the death of him the said T. K., all that, &c. with several limitations over; this was held to operate as a covenant to stand seised to uses. 2 Wils. 75.]

So, by will; for a man may devise lands to the use of another. R. 1 Leo. 258, 4. Vide Devise, (I).

But an use cannot be raised upon an use. 1 Leo. 6. 148. Vide Bargain and Sale, (B 3.)

[Lands are devised to trustees to receive the rents and profits, and pay a certain portion to A.; A. assigns part of her share to B. a married woman, to her separate use. Held, that the trustees under the will must be considered as trustees for B., so that her husband could not sue A. for his wife's share received by her. 5 T. R. 492.]

### (D) How declared.

#### (D 1.) What shall be a sufficient deed for it.

An use cannot be declared by parol without deed or other writing; and therefore a bargain and sale, or covenant to stand seised, &c. is not good without deed. Vide Bargain and Sale, (B 4.)—Covenant, (G 1.)

So, the use of a fine, recovery, or feoffment, cannot arise to a stranger by parol, except in special cases.

So, a fine upon grant and render cannot be averred to be to another use than it imports, without writing. 2 Co. 75, 76. a.

So, a fine of a rent cannot be declared to the use of a stranger without a deed. R. 2 Rol. 788. l. 27.

And now, by the st. 29 Car. 2. all declarations of trust of any lands shall be manifested and proved by writing, signed by the party having power to declare such trust.

And therefore, an absolute devise to A. shall not be averred to be made upon trust for a superstitious use. R. 1 Sal. 162. Vide post, (D 2.)

But a deed indented, or poll, precedent to the fine, recovery, &c. is sufficient to declare the uses thereof.

So, if a man makes a feoffment to the use of such person, and for such estate, as he shall declare by his will, his will is sufficient to declare the uses. Co. L. 111, 112. R. 1 Vent. 194.

So, if a devise be to B. to the use of D., the will is sufficient to guide the use. Mo. 107. Poph. 4. 2 Vent. 312. Vide post, (D 2.)

If the devise is to A. and B. and their heirs, to the use and intent that they permit G. to take the profits for his life, and, after his death, that they stand seised to the use of the heirs of the body of G.; it will be a use executed in G. in tail. R. Lut. 824. Sal. 679.

So, if a man devises land by his will, and afterwards makes a feoffment to the use of such persons, and for such estates, as he has declared by his will; though the feoffment is a countermand of the will, yet it is sufficient

sufficient to declare the uses of the feoffment. R. Mo. 786. 3 Ca. Ch. 100.

So, if a lord of a manor releases to his copyholder and his heirs, to the use of B., this release is sufficient to declare the use; for a rent might be reserved upon it. R. 2 Rol. 788. l. 35.

So, if a man covenants to make an assurance by fine, feoffment, &c. which shall be to the same uses, a fine, &c. afterwards without a new agreement, shall be to the uses of the covenant; though by the deed in which the covenant is, it was to B. and his heirs upon condition, and the feoffment or fine is to him and his heirs, generally, which imports an absolute estate. R. Cro. El. 300.

So, if there be a deed between an husband of the one part, and his wife of the other part, agreeing that a fine shall be levied to such uses, it is sufficient to declare the uses; for it is a deed-poll. R. 4 Mod. 264. 267.

So, every writing which shews the agreement and intent of the parties. 4 Mod. 264. Ca. Parl. 145.

As, a covenant to levy a fine of all his land, which for twenty-four acres shall be to the use of B., and he afterwards levies a fine of twenty-four acres of land only. Dub. 2 Rol. 791. l. 25.

A deed, though it be afterwards erased, and the seals torn off, by accident. Lut. 226.

A deed of bargain and sale, or feoffment, though no inrolment or livery ensues. 4 Mod. 264.

So, the uses of a fine, &c. may be declared by a deed subsequent to the fine. Dy. 136. a. Cont. Cro. El. 218. R. acc. 9 Co. 10. 15. a. Mo. 192. R. 2 Rol. 782. G. 1 And. 125.

And though a subsequent deed declares the intent of the parties to be, that a fine shall be levied to such uses, it is sufficient, though it does not expressly say, that it was the intent at the time of the fine, &c. Semb. cont. Mod. 192.

And though by the st. 29 Car. 2. 3. it is enacted, that all declarations of trust, &c. shall be manifested in writing, yet uses and trusts may be declared by a subsequent deed by the st. 4 & 5 Ann. 16.

So, there may be an information for the discovery of a trust by parol to superstitious uses; for the st. 29 Car. 2. does not bind the king. R. 1 Sal. 162.

So, if a deed be to declare the use of a fine, which varies in some circumstances, yet it shall be to the same uses by construction of law, if nothing appears that it was to another intent. Ca. Parl. 144. R. 5 Co. 26. b.

So, if the use of a fine be declared by a deed precedent, which agrees in time, parties, quantities, and other circumstances, no averment shall be admitted that it was to other uses. Ca. Parl. 144. R. 5 Co. 26. b.

But if the feoffor, conusor, &c. after the fine, &c. and before a subsequent deed to declare the uses, makes any mean estate or incumbrance it shall not be avoided by such subsequent declaration, without proof that the fine was intended to the same uses. R. 9 Co. 11. a.

So, if the declaration of uses be by deed subsequent, the fine may be averred to be to other uses. R. 9 Co. 11. a. Ca. Parl. 144.

So, if it be by deed precedent, where the fine varies, in time, number  
of

of acres, or other circumstances, from the deed. R. 2 Cro. 29. 5 Co. 26. b. Mo. 723.

So, if there be a precedent deed to declare the uses of a fine, &c. and it varies in quantity of acres, any of the parties, time of levying, or like circumstances, it may be averred by parol to be to the same uses. R. 2 Cro. 76. a.

If the deed be, that a fine shall be levied to four persons, and two die, and it is levied to the survivors, it shall be to the same uses. R. 2 Rol. 799. l. 25.

So, if a common recovery be suffered oct. Mich., and by indenture 14 Nov. it is declared, that all recoveries hereafter to be suffered shall be to such uses; this is not sufficient to lead the uses of a recovery before, in the same term, (though all the term in law is but one day,) without an averment that such was the intent. R. 2 Rol. 799. l. 10.

The declaration of a use is but the direction of a trust. Mo. 610.

And such writing, words, or circumstances, as manifest the intent and mind of the feoffor, are a sufficient declaration of a use. Mo. 610. Vide post, (L 3.)

As, if upon a feoffment to A. and B. they by another deed agree, that after 100 years the feoffor and his heirs shall have it again; this is sufficient to declare the use to the feoffor after 100 years. R. Mo. 723.

[If a father, tenant for life, and son in tail, with remainders over, on an advantageous marriage for his son an infant, join in executing articles, whereby the father covenants that, after the son's coming of age, they will join in fine and recovery of the estate to divers uses, and they accordingly join in such fine and recovery; the son's executing these articles is not sufficient to declare the uses of fine and recovery. 3 P. W. 206.]

(D 2.) To what use it shall be, when there is no declaration.

If a fine is levied, and no use declared nor consideration paid, it shall be to the use of the conusor. 2 Rol. 781. l. 42.

So, if a common recovery is suffered, it shall be to the use of him who suffers the recovery. Dy. 146. b. 2 Rol. 781. l. 40. 789. l. 47. D. 9 Co. 8. b.

So, since the st. *quia emptores terrarum*, a feoffment, without a use declared or consideration paid, shall be to the use of the feoffor. 2 Rol. 781. l. 35. R. Dy. 146. b. Acc. 2 Lev. 77.

Though tenant for life, and he in remainder in tail, join in a feoffment to A. and his heirs, to make him a tenant to the *præcipe*. R. Pal. 359.

Or, if tenant for life surrenders to him in remainder in tail, to make him tenant to the *præcipe*. R. Pal. 359.

Or, tenant in tail levies a fine to A. and his heirs for such an intent, and seven years after suffers a recovery without declaring the use. R. Eq. R. 16.

And it shall be to A. and his heirs till the recovery, without any use declared by the st. 29 Car. 2. 3. for the intent appears by the voucher. R. Eq. R. 17.

And a fine, recovery, or feoffment, shall be to the use of the feoffor, &c. in the same plight, and for the same estate, as he had before; as,  
if

if two joint-tenants levy a fine, &c. it shall be to their use jointly. 2 Co. 58. a.

If tenant for life and he in reversion levy a fine, it shall be to the one life, to the other in fee. 2 Co. 58. a.

So, if he suffers a recovery. R. Pal. 405. Latch, 82. Noy, 77.

So, if the owner of the land and a stranger join in a fine, the use arises wholly to the owner, and nothing to the stranger. 2 Co. 58. b. R. 2 Rol. 789. l. 50.

So, if husband and wife, of the wife's land, it arises wholly to the wife. R. 2 Co. 58. b. Vide Baron and Feme, (G 1.)

So, if the use declared is void or impossible, it shall be to the use of the feoffor; as, a feoffment to the use of A., and there is no such person in *rerum natura*. Dal. 112.

So, a fine *sur grant et render*, if the uses upon the render are void in toto, shall be to the uses to which the render is intended. Mo. 488.

A feoffment to the uses mentioned in such an indenture, and there is no such indenture, shall be to the use of the feoffor. Dal. 112.

But if tenant in tail, remainder to himself in fee, levies a fine, without declaring the use, it shall be to himself in fee.

So, if tenant in tail, remainder to B. in fee, suffers a recovery, without declaring the use, it shall be to him in fee; for he had a power to do it, and it shall be intended to that intent. Pol. 526. R. P. Eq. R. 16.

And the use follows the nature of the land, since the st. 27 H. 8. 10. as well as before. R. 1 Co. 127. 2 Co. 58. 2 Rol. 780. l. 26.

And therefore the use of land of the nature of Borough English shall descend to the youngest son. 2 Rol. 780. l. 23.

So, if the land was of the nature of gavelkind, he shall be afterwards seised in the same manner; for the use follows the nature of the land. 2 Rol. 780. l. 30.

If the feoffor was seised of the land, as heir of the part of his mother. Co. L. 13. a. Vide Discent, (C 6.)

So, if an use be declared upon a contingency, the use in the mean time shall be to the feoffor, &c.; as, if a man makes a feoffment, and declares that after a marriage between him and A. it shall be to the use of him and his wife and to his heirs, the use is to him and his heirs, as before, till the marriage. R. 2 Rol. 791. l. 35. Pol. 58.

So, if the feoffment be to the use of his will, or to the use of such a person as he shall appoint by his will, the feoffees are seised to the use of the feoffor and his heirs in the mean time. Co. L. 271. b. Pol. 58.

So, if the feoffment be to the use of such a one for life, or for years, &c. the use of the inheritance shall be to the feoffor. Co. L. 271. b.

Or, to the use of A. for life, remainder to B. in tail, the use of the fee shall be to the feoffor. Pol. 58.

But if feoffees were seised to uses, and before the st. 27 H. 8. 10. had levied a fine or made a feoffment, &c. the second feoffees, having notice, shall be seised to the first uses. Pl. Com. 351. a. 1 Co. 122. b.

Though the feoffment, &c. was made to them upon a valuable consideration. Pl. Com. 351. a. 3 Co. 81.

So, if they had not notice, where the feoffment was without consideration. 3 Co. 81. b. Pl. Com. 351.

Or, upon consideration of blood, &c. and not for money. 3 Co. 81. b. 2 Rol. 779. l. 17.

Though

Though the feoffment was to cestuique use himself; as, if the feoffment was to A. and his heirs male of his body, remainder to B. in fee, and the feoffees enfeoff A. (being conusant of the uses) to the use of himself and the heirs of his body, and A. dies without heir male, his heir general shall be seised to the use of B. in fee. R. per all J. Kel. 93. a. 2 Rol. 781. l. 25.

So, if A. covenants to stand seised to the use of himself for life, remainder to his son for life, with several remainders in tail, remainder to his right heirs, and after reciting the uses, without consideration grants his reversion in fee to B. to the use of B. and his heirs, B. shall be seised to the first uses, since the st. 27 H. 8. 10. as before, having notice, &c. R. 2 Rol. 796. l. 5.

Yet where feoffees to an use make a feoffment to others, not having notice, upon a valuable consideration, the second feoffees are not seised to the first uses. 1 Co. 122. b.

So, if the feoffment was to three, of whom two were conusant of the first uses; but the third was not. Per two J. Hob. 350. but the two conusant shall answer in equity. Hob. 350.

So, if the feoffment was to others, having notice, they are not seised to the first uses, where the first uses were raised without consideration, or upon consideration of blood only. 3 Co. 81. b. 2 Rol. 779. l. 22.

So, if the feoffment was to others, having notice, and expressly limited to their use, they are not seised to the first use.

So, a gift in tail shall be to the use of the donee, though no use or consideration be expressed. Dy. 146. 2 Rol. 781. l. 47.

So, a lease for life, or years, shall be to the use of the lessee. 2 Rol. 781. l. 50.

So, an assignment of a lease shall be to the use of the assignee; for a consideration is implied; as, payment of rent to him in reversion, &c. R. 2 Rol. 781. l. 55.

So, if part was expressed to be to the use of the grantee, and nothing said as to the other part, the whole shall be to the use of the grantee. R. 2 Rol. 782. l. 5.

So, if a fine *sur grant et render* was to B. with a render to A. in tail, and nothing said of the fee, it was to the use of the conusee. R. Mo. 46. 488.

So, if a recovery was to the intent they should convey, it should be to the use of the recoverors in the mean time. R. Mo. 108.

So, before the st. *quia emptores terrarum*, a feoffment, without use or consideration, was to the use of the feoffee in respect of his tenure of the feoffor. Dy. 146.

So, a fine, *sur grant et render*, upon the acknowledgment, shall be to the use of the conusee, otherwise there can be no render. R. Mo. 488.

If the render be to A. for years, and then to the first, second, &c. sons in tail, which remainders are void for want of a freehold, the uses after the term to A. shall be to the conusee. R. Mo. 488.

So, a devise to A. and his heirs generally shall be to the use of the devisee, and cannot be averred to be to another use. Semb. 1 Sal. 162. Vide ante, (D 1.)

So, a devise to A. and his heirs for the life of B., upon trust to permit B. to take the profits for life, shall be a trust, not an use executed in B. R. 2 Vent. 312.

(D 3.) To

## (D 3.) To what, when different declarations.

If there be an indenture to declare the uses of a fine, to be levied, and afterwards another agreement is made for the uses of the same fine, by writing, as high or higher, the last agreement shall stand. 5 Co. 26. a.

As, if there be an indenture to declare the uses of a fine, and afterwards another indenture for the same purpose, the last indenture shall direct the use. Mo. 107. R. that it may be averred to be to the use of the one indenture, or the other. 2 And. 46.

If there be an indenture 29th January to declare the use of a fine, and there be a deed 31st January between husband and wife, which declares other uses, the fine shall be to the use of the last deed, where there was a variance between the fine and indenture 29th January. R. 4 Mod. 261. Ca. Parl. 145.

Though the variance be, that it was levied before, as well as where it is after, the time directed by the deed. R. 4 Mod. 261. Ca. Parl. 145.

But if a man by indenture covenants to make a mortgage, and to levy a fine to the use of the mortgagee, and before the fine ingrossed, by another indenture agrees the fine shall be to the same use, with an addition, that the mortgagor shall take the profits in the mean time; this last indenture does not revoke the first, though it neither recites nor mentions it, for both shall be taken as one conveyance. R. 2 Rol. 793. l. 10.

So, if husband and wife, tenants for life, and to the heirs of the husband, make a mortgage with a proviso, that upon payment of 100 pounds, they shall re-enter, and that all fines, &c. shall be to the mortgagee till payment, then to the husband and his heirs, and a fine was levied, then the wife survived and paid; the fine shall be construed to be to her use, not to the use of the heir of the husband. R. Cro. El. 744.

So, if a husband and his wife, who has a jointure in the land, levy a fine in order to make a building lease, and that the wife shall have the reserved rent for her jointure; this, being for a special purpose, does not extinguish her jointure, nor subject it to a meane charge made by the husband between the jointure and lease. R. Skin. 238.

[So, if a man seized to him, and the heirs of his body, remainder to his right heirs, by lease and release, conveys to trustees to the use of himself for life, remainder to trustees to preserve, &c. to his intended wife for life, to his first and other sons by her; then marries, has issue, suffers a recovery, and by deed declares the uses to be to A. &c. to sell, and out of the money to pay debts, and to pay the residue, or re-convey lands unsold to himself and heirs, and A. conveys to B.; B. has no title, for the recovery inures to the use of the settlement, and tenant in tail can convey a base fee, not void, but voidable by the issue in tail. 3 B. M. 1703.]

## (D 4.) To what, when the declaration is not by all parties.

If two joint-tenants levy a fine, and only one declares the uses, it will be good for a moiety only, except where the other's consent to such declaration is proved. Latch, 82. Pal. 405. Noy, 77.

So,

So, if tenant for life, remainder in tail, suffers a recovery in which the remainder-man is vouched; if he does not join in the declaration of the uses, he is not bound. Latch, 82. Pal. 405. Noy, 77.

**(E) Who may be seised to an use.**

All persons capable of taking by feoffment, may be seised to an use,

**(F) Who not.**

But no one can be seised to an use, who cannot execute an estate to the use; and therefore a donee in tail, before or since the st. 27 H. 8. 10. never can be seised to the use of another. Co. L. 19. b. R. 2 Co. 78. a. R. 2 Rol. 780. l. 10. 15. 2 Cro. 401. 3 Bul. 184.

And if a gift be to him, *habendum* to him and the heirs of his body, to the use of him and his heirs, the use shall be rejected. 2 Cro. 401.

Or, it will rather be a limitation at common law, and not by way of use, and the word use shall be rejected. R. Cro. Car. 231. 245.

So, no one can be seised to an use, against whom an attachment does not lie out of Chancery to compel the execution of the use; and therefore a corporation cannot be seised to an use. 1 Co. 122. D. M. 9 W. 3. (Com. 29.)

Nor the king. Mo. 374.

And therefore if a lessee in trust for B. is attainted of treason, whereby the term is forfeited, the king will not be subject to the trust. 2 Rol. 780. l. 5. Dub. Hard. 469.

If A. to whom a bond, &c. is given in trust for B. becomes *felo de se*, the king shall not be trustee. Q. Hard. 176.

So, no one can be seised to an use who does not come in, in privity of the estate; as, a disseisor, abator, or intruder. 1 Co. 122. a. 139. b.

Tenant by the curtesy or in dower. 1 Co. 122. a.

So, if an use be to A. for life, remainder to B., and A. makes a feoffment to another, who has notice of the uses, the feoffee shall not be seised to the first uses; for he is not in, in privity of the estate of the feoffor; but has another estate. 1 Co. 122. b.

So, persons who claim paramount, &c. cannot be seised to an use; as, a lord by escheat. 1 Co. 122. a. 139. b. All. 14.

The lord of a villein, or who enters for mortmain, or recovers in a *cessavit*. 1 Co. 122. a.

So, an alien cannot be seised to an use. 1 Co. 133. a.

Nor, a person attainted. Ibid.

**(G) Who may give or take an use.**

Yet a corporation by bargain and sale may sell land; for they may give an use, though they shall not be seised to an use. Vide Bargain and Sale, (B 3.)

So, a fine to A. with a deed, which declares the uses to the king is sufficient to pass an estate to the king. 1 Leo. 33.

**(H) What interest the feoffee to use has in the land.**

Feoffees to use must be seised of the land, otherwise there can be no execution of their estate, seisin, and possession to cestuique use. Vide ante, (B 1, 2.)

So, if there be any future or contingent use, a sufficient estate must remain in the feoffees to preserve such future use when it comes *in esse*. 1 Co. 129, 130. 137. a.

And if by disseisin, or otherwise, the particular estate be put to a right, before the contingency happens, and the particular tenant dies before entry, the feoffees after his death may enter and revive the estate. R. 2 Rol. 797. l. 20. 40. Vide Estates, (B 13.)

Or, rather all the estate is taken out of the feoffees, to supply the uses vested, or when they come *in esse*. Pol. 385, &c.

But the feoffees are only organs or instruments to complete the conveyance, and their seisin continues only for an instant. Pol. 393.

And therefore the wife of the feoffee, &c. shall not be endowed.

So, if the feoffee be attainted for treason or felony, committed before the feoffment, it shall not be forfeited to the king. Semb. cont. Mo. 196.

So, by the st. 27 H. 8. 10. all right, interest, &c. of the feoffee himself to the estate is saved.

And therefore, if a lease be to A. and B. in trust for another, and afterwards a feoffment, &c. is made to A. and others of the same land to uses, the lease shall not be merged. R. Mo. 196.

If a lessee for years be made tenant of the freehold, and tenant to the *præcipe* for a common recovery to an use, his term shall not be merged. R. 1 Sal. 241. Acc. 1 Vent. 195.

If a lease for years be made by fine to the feoffee by him who has a contingent use in remainder, it will be good; for no use remains in the feoffee; and when the contingency happens, so much of the estate only arises to him, as is sufficient to convey the use to him in remainder, and the lease is not disturbed thereby. R. Pol. 64. 66. 393.

**(I) What the cestuique use, [and what he may do.]**

By the st. 27 H. 8. 10. cestuique use is immediately seised and in actual possession. Cro. El. 46.

And therefore shall have assise, or trespass, against a stranger, before entry. R. Cro. El. 46.

[If a bond be given by C. to A. in trust for B., in an action on the bond by A., C. may set off a debt due from B., though the trust does not appear on the face of the instrument. 1 T. R. 621. Id. 622.]

[A devise in fee to trustees, without any specific limitation to cestuique trust, gives him a fee. 8 T. R. 597.]

[The possession and receipt of the rent, issues, and profits of a trust estate by cestuique trust for more than twenty years after the creation of the trust, without any interference of the trustees, when such possession, &c. is consistent with, and secured to the cestuique trust by the terms of the trust deed, is not adverse to the title of the trustees, so as to bar their ejectment against the grantees of the cestuique trust brought after the twenty years. 8 East, 243.]

[The doctrine that the legal estate cannot be set up at law by a trustee against his cestuique trust, 1 T. R. 600. 735. 760., has been solemnly repudiated. 5 East, 138. 8 T. R. 118.]

[The legislature, in passing the statute 1 Ric. 3. c. 1., only intended that where a person having an estate in possession, conveyed it to a trustee to his own use, and afterwards conveyed it away to a purchaser, he should not set up the estate in his trustee against the purchaser. 7 T. R. 43.]

[Semble, that a *bonâ fide* lease made by an equitable tenant in tail, will prevent the trustees in whom the legal estate is vested, from recovering in ejectment against the lessee; although, if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred. 1 H. Bl. 446. But see the decisions cited in the note at the end of the case.]

### (K) Limitation of uses.

#### (K 1.) What consideration will be sufficient.

To a limitation of uses, upon a bargain and sale, or covenant to stand seised, there must be a sufficient consideration.

What will be sufficient, vide Bargain and Sale, (B 11.)

What upon a covenant, vide in Covenant, (G 3, &c.)

But in a conveyance which operates by transmutation of the possession, as, a fine, feoffment, &c. the will of the parties is sufficient without other consideration; and therefore, if a man in consideration of blood, &c. levies a fine to the use of B. his bastard, it is sufficient, in a fine, to raise the uses to B. though he was a bastard. 2 Rol. 791. l. 15.

If a man in consideration of marriage levies a fine, or makes a feoffment to the use of A. and B., &c. the use will arise, though the marriage does not take effect. R. Mo. 102. R. 2 Rol. 792. l. 40. R. 1 Leo. 138.

If a man in consideration of 100*l.* paid by B. makes a feoffment to him, to the use of him and C., it is sufficient to raise a use to C., though the whole consideration was given by B. 2 Rol. 791. l. 20.

If a man upon a feoffment, &c. declares the use to the feoffee, the use shall be to him; though no consideration, and the feoffor afterwards occupies for many years. R. 1 And. 57. Bend. pl. 20.

#### (K 2.) To whom an use limited shall arise.

If a man covenants with B. upon such an act to stand seised to B. and his heirs, and B. dies before the act performed, the use arises to the heir. R. 2 Rol. 794. l. 45. Dub. Mo. 548.

If the limitation is to A. and such wife as he shall take, and he afterwards marries, the use may well arise to such wife. R. per three J. Dy. cont. Mo. 96. D. Mo. 377.

If a feoffment is declared by another deed to be to the intent that, after feoffee has enjoyed for 100 years, the feoffor and his heirs may enter; this amounts to a declaration of uses to him and his heirs, and after 100 years the heir may enter. R. Mo. 722.

If a devise be to A. and his heirs upon a contingency, the deviser dies, the contingency happens after the death of A., his heirs shall take. Fon. 59.

If a feoffment be to the use of A. for life, remainder to B. in fee; if A. refuses, the use shall be to the remainder-man immediately. R. 1 Co. 154. b.

So, if a man covenants to stand seised to the use of B. for twenty-four years, and after the determination of the term to A., if the term does not arise for want of a good consideration, A. shall take immediately. R. 1 Co. 152. b. Mo. 195.

But generally where a man raises an use by a covenant to stand seised, if the estate of one is void for want of a good consideration, he in remainder shall not take immediately; for each estate arises upon its own proper consideration; as, if a man covenants to be seised to the use of B. for life, and after his death in consideration of 100*l.* to A. in fee; if B. refuses, or his estate is void, A. shall not have it till his death. R. 1 Co. 154. b.

So, if the covenant be to the use of B. for twenty-four years, and after the end of those years to A., if the estate for years is void, A. shall not take till the twenty-four years are expired. R. 1 Co. 154. b. 1 Leo. 195.

To the use of B. till his age of twenty-one years, and after such age to A.; if B. dies, A. shall not take till B. would have attained his age of twenty-one years. 1 Leo. 195.

(K 3.) When it shall arise by the feoffment, &c. or by a subsequent deed.

If a man makes a feoffment to the use of such person as he by his will shall appoint, the use arises by the feoffment, and the will is only declaratory. Co. L. 271. b. R. 6 Co. 17, 18. Mo. 280. 567. 1 Bul. 200. Vide Devise, (O).

And if he devises the land by his will, it will be a sufficient direction of the uses. Dub. Mo. 476.

But if the feoffment be to the use of his will, or to perform his will, the uses are raised by the will, and not by the feoffment. Co. L. 271. b. R. Mo. 280. Dub. Mo. 476. R. 6 Co. 18. a.

So, if the feoffment be to the use of such person, and for such estate, as he shall by his will appoint, and he devises the land by his will without reference to his power, where he has authority to devise, as well as to dispose by declaration of the uses of the feoffment, the estate passes by his will. R. 6 Co. 18. a. Mo. 280. 567. 1 And. 246.

(K 4.) When it shall arise upon a condition, &c. performed.

If A. tenant in tail conveys to B. and his heirs, who re-conveys to A. and his heirs upon condition of entry, if A. does not pay 300*l.* at such a day, which was intended as a security for the said sum and interest, and afterwards A. suffers a recovery, and devises to D.; the recovery operates upon the estate re-conveyed to A. in fee, not upon the estate to B. R. 1 Ch. R. 97.

But if an use is limited upon an impossibility, it shall never arise; as, if a man covenants to stand seised to the use of B. after the end of the term which A. has in the same land; if A. has not any term, the use shall never arise to B. 1 Leo. 195.

So, if an use be limited upon a contingency, which never happens,  
if

it will be void; as, if it is to A. if all his brothers and their issues die, and one brother leaves issue. R. 2 Lev. 157.

So, if an use be limited to A. and such wife as he shall afterwards marry, for their lives; the wife he shall afterwards marry shall not take; for she cannot take jointly with her husband, as the words import. R. 1 And. 42.

So, an use will not arise by implication. Semb. Pal. 94.

As, if an estate be to A. for life, and after the death of A. and B. to C., no use arises to B. by implication. Pol. 94.

(K 5.) What shall be a settled use.

All uses are *in esse* in possession, remainder, or reversion, or in contingency. 1 Co. 121. b. Vide Estates, (B 16, 17, 18.)

If the use is raised by the feoffment, &c. and vests in a certain person, this will be a settled use.

Though the consideration of the feoffment was fortuitous; as, if a man covenants in consideration of a marriage with B. to make an assurance to the use of himself and B. &c., and afterwards makes a feoffment and levies a fine to the same uses, B. takes an estate, though the marriage does not take effect. R. 2 Rol. 792. l. 40. Vide ante, (K 1.)

(K 6.) What a contingent use.

But if a man levies a fine of the manors of A. and B., viz. of A. to the purchaser and his heirs, of B. as a collateral security for the purchase, viz. to himself and his heirs, till the manor of A. be evicted, and, after eviction, to the purchaser and his heirs, the use to the purchaser is contingent, and does not vest till eviction. R. 2 Rol. 792. l. 30.

If grantor of a rent of 20*l.* for security of payment levies a fine to the use, that if the rent be in arrear, the grantee may enter, if 10*l.* payable at Michaelmas is in arrear, he may enter; for the whole is in arrear, when any part is not paid at the day. R. 2 Rol. 799. l. 35.

But if the fine is to the use, that, if the rent be in arrear, and the distress for it replevied, the grantee may enter; and for rent in arrear before the fine there is a distress after the fine, and it is replevied, the grantee cannot enter. R. 2 Rol. 800. l. 10.

So, if a bargainee covenants upon payment of so much money to stand seised, &c. the use does not arise upon tender and refusal, without actual payment. R. Mo. 35.

(K 7.) A springing or resulting use.

If a fine, feoffment, &c. be to another without consideration, or no use is declared, it shall be to the use of the feoffor, &c. Vide ante, (D 2.) Vide Executory Devise, in Devise, (N 16.)

[And though lands be comprehended in the general sweeping clause of a deed of settlement, (to certain uses,) yet, if no use be declared of them, they descend to the heir. Cowp. 9.]

[But a declaration of uses not in writing will rebut the resulting use to the conusor of a fine, in favour of the conusee. Doug. 26.]

If it be by one seised to other uses, and without valuable consideration,

tion, or upon valuable consideration with notice of the former uses, it shall be to the first uses. Vide ante, (D. 2.)

If a fine, feoffment, &c. be to another upon valuable consideration, the use results to the feoffee, &c.

So, if a man makes a feoffment, &c. and declares the use to himself and A. his wife after their marriage, the use will well arise to A. upon such contingency, viz. that the marriage shall take effect; for till the marriage the use results to the feoffor and his heirs. R. 2 Rol. 791. l. 35.

So, if a man covenants, in consideration of his marriage with A., to stand seised to the use of himself and A. till marriage, the use does not arise. R. 2 Rol. 792. l. 50. Vide Covenant, (G 5.)

If a man covenants to stand seised after his death, the use results to the covenantor for life, and does not arise to the uses limited till his death. Semb. 1 Co. 154. b. 2 Lev. 77

So, if he covenants to stand seised after so many years, or after any other contingency. 2 Leo. 195. Pol. 65.

So, if a feoffment be to the use of the right heirs of B. after his death, the use arises after the death of B. to his right heirs, and in the interim to the feoffor. Semb. 1 Sal. 225.

Or, to the use of C. after the deaths of A. and B. Pol. 52. 65. 95.

So, if he covenants to stand seised to the use of his mother in fee, if he himself dies without issue; for the contingency happens upon his death. Pol. 530.

If A. settles an estate to the use of B. after the death of him and his wife without issue, if the wife dies without issue, living A., the use to B. will be good; for the use results to B. during his life. 2 Ver. 372.

If A. makes a feoffment to the use of himself for life, and then to B. his intended wife, till their son attains the age of 21 years, and afterwards to B. for so long time as she continues sole; if A. dies without issue, B. shall have it for her life. R. Dy. 300. b. Mo. 15.

But an estate does not arise by way of a springing use, after a death without issue. R. Skin. 352.

So, if husband and wife, seised in right of the wife, levy a fine to the use of the heirs of the body of the husband upon his wife begotten; the use does not arise to the heirs of the body of the husband, after the death of husband and wife, as a springing use. R. 4 Mod. 153. Ca. Parl. 105.

So, an use does not arise by implication to the husband for his life; for there can be no use by implication, but to the person who had the use before, and this was the wife only. R. 4 Mod. 154. Ca. Parl. 105.

So, if there be a present limitation of a use, which the cestuique use cannot take *in presenti*, it shall not arise to him, as a springing use *in futuro*; as, if a fine, &c. be to the use of the right heirs of B. who is alive, the use shall never arise to his right heirs. 1 Sal. 225.

[If baron seised in fee of lands in A., and feme seised in fee of lands in C., before marriage, settle the whole to the baron for life, remainder to the feme for life, remainder to the children of the marriage for such estates, &c. as the feme shall appoint; and for want of such appointment, to the children equally, and their heirs, as tenants in common; and for want of such issue, to such persons and uses as the feme shall appoint;

appoint; and for want of such appointment, as to the lands in C., to the heirs of the feme, and as to the lands in A. to the heirs of the baron; if the baron die, leaving one son only, and the feme appoint the whole to him by her will; but if he die without issue, and under 21, the whole to strangers; then if the son die under age and without issue, this is either a good appointment, or, if it be not, it is a good executory devise of the feme's resulting use in the lands in C.; but if the appointment be bad, the heir, on the part of the baron, has title. 1 Wils. 270.]

[A. by will devised to trustees to the use of B. for life, remainder to trustees, &c. remainder to the first and other sons of B., remainder to the daughters of B., remainder to the use of such person as he should appoint by deed; and afterwards by a deed (in which he recited the will) he appointed the same premises "after the death of B. and failure of her issue, to the use of the first and other sons of C." &c. B. afterwards died without issue; holden, that the limitations created by the will and the deed could not be united, and that the limitation in the latter, to the first and other sons of C. &c. was too remote to take effect, being after a general failure of issue of B. 5 T. R. 92.]

[By deed and fine an estate was limited to the use of the husband for life, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the wife for life, remainder to the trustees and their heirs (not saying "during her life") in trust to support the contingent uses and estates thereafter limited, remainder to the first and other sons in tail, remainder to the wife in tail, remainder in default of issue to such persons and for such estates as she should appoint, &c. It was holden that the trustees took a legal estate in fee after the determination of the wife's life-estate, and that all the subsequent limitations were trust-estates. It was holden also, that an appointment by the wife to the use of the right heirs of the husband could not unite with the antecedent life-estate of the husband, but could give only an equitable estate to the person who at his death should answer the description of his right heir. 7 T. R. 342. Id. 438.]

[Where after a devise to one for life the deviser limited the estate to trustees and their heirs in trust to preserve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his decease; and he afterwards gave other estates for lives with several remainders over, and after each estate for life he interposed the same estate to trustees and their heirs; it was holden, that this shewed his intent to be that the estates to the trustee should be confined to the lives of the several tenants for lives, and consequently that those in remainder took legal estates, there being no other circumstances in the will to shew a contrary intent. 7 T. R. 433.]

[There may be any number of springing uses within twenty-one years after lives in being. 2 Ves. jun. 241.]

## (L) *Uses ; how destroyed.*

### (L 1.) By feoffment, &c.

To every use there are two incidents inseparable; privity in estate, expressed or implied; and confidence in the person, express or implied. 1 Co. 121. b. Vide post, (L 6.)

And therefore, a feoffment, upon valuable consideration without notice, destroys the uses. *Vide ante*, (D 2.)

So, a disseisin, or entry, &c. by such as cannot stand seised to uses. *Vide ante*, (F).

So, by destruction or merger of the particular estate before the contingency happens, the contingent uses in remainder will be destroyed or defeated. *Semb. Dy. 340. 1 And. 314. Vide Estate*, (B 15.)

So, if a man raises an use by covenant, &c.

So, if he covenants to be seised to the use of B. in consideration of marriage with his daughter, and before the marriage B. disseises the covenantor, and makes a feoffment, and then the covenantor re-enters, and the marriage takes effect, the uses were destroyed by the feoffment. *R. 1 Co. 174. b.*

So, if a man covenants to stand seised to him and his heirs till the marriage of his son, and then to himself for life, then to the son for life, remainder to the wife and the issue of such marriage, and before the marriage devises the land, this prevents the use arising. *Semb. Mo. 733.*

So, if a man covenants to stand seised to the use of his son for life, and afterwards to such wife as his son shall take, and before his son's marriage makes a lease for years, and then the marriage takes effect, the lease is a revocation of the uses upon the covenant during the term; for the wife shall take subject to the lease, which was made by the covenantor before the contingency. *R. 2 Rol. 793. l. 30. R. cont. 2 Cro. 169.*

So, if he makes a lease to commence at a future day. *Dub. 2 Rol. 794. l. 10.*

So, if there be a fine of the manor of B. to A. and his heirs, and of the manor of C. to the conusor till eviction of the manor of B. by his wife, and then to A. and his heirs, and A. makes a feoffment of the manor of B. before eviction, which afterwards happens, such feoffment destroys the contingent use of the manor of C. *Dub. 2 Rol. 795. l. 40.*

So, if the conusor was attainted of treason before the eviction, the contingent use of the manor of C. is destroyed. *R. Mo. 375.*

But, if a covenantor to uses grants his reversion in fee to another, who has notice of the former uses, this does not destroy the uses; for the grantee shall be seised to the first uses. *R. 2 Rol. 796. l. 5. Vide ante*, (D 2.)

So, a devise of rent, annuities, &c. out of the land, by the covenantor, before the contingent uses arise, does not destroy them. *Semb. Mo. 733.*

So, if an use be to A. for life, remainder to others, &c., a feoffment or other act by A. does not destroy the subsequent uses (except where the particular estate is destroyed) where the contingent uses in remainder depending upon it are not vested. *Vide Estates*, (B 13. 15.)

As, if an use be to A. for life, remainder to his first son, and before his birth A. makes a lease for years, the son, born after, shall avoid the lease after the death of A. *2 Rol. 794. l. 20.*

If an use be to the heirs male of B. by a second wife, and the covenantor dies, a fine by his heir does not destroy the uses. *2 Lev. 75. Vide post*, (L 6.)

(L 2.) By

(L 2.) By a power of revocation. — What shall be a good one.

So, to estates raised by limitation of a use, a power of revocation may be annexed, and it will not be repugnant to the estate ; as, if a man covenants to stand seised to the use of himself for life, and afterwards to his son in tail, with remainder over, proviso, that it shall be lawful for him, during his life, to revoke those uses, and limit new uses. Co. L. 237. a. 3 Ca. Ch. 66.

So, if he makes a feoffment, or levies a fine, or suffers a recovery to the use of himself for life, with remainder, &c. and adds such a proviso. R. Mo. 610.

So, if he levies a fine, or suffers a recovery to uses, with a power of revocation, and afterwards, by indenture, revokes them, and limits new uses with a power of revocation, this second power is good ; for the whole springs out of the recovery. R. 2 Rol. 262. l. 35. Lane, 119.

So, the power of revocation may extend only to part of the use ; as, if a feoffment be to the use of the feoffor for life, with divers remainders over, proviso, that he may revoke the use to himself for life, and limit it to another, and that the remainders shall stand, it will be good. Semb. 2 Rol. 262. l. 30.

It may extend to a revocation of contingent uses, as well as uses *in esse*. Vide post, (L 4.)

So, he may limit a power to a stranger to revoke. 1 Co. 174. a.

(L 3.) By what words.

And any words which shew the intent of the party are sufficient to create such power of revocation ; as, if it be said, and if the said A. shall make an estate in fee or tail, &c. then the use shall be, &c. without saying of what land, it will be a good power ; for it shall be intended of the land in the indenture. R. 2 Rol. 262. l. 40. Vide ante, (D 1.)—Pojar, (A 2.)

So, if the words are, it shall be lawful for B. to alter, change, &c. any use and limit new, it is sufficient, without saying that he shall have power to revoke. R. Mo. 611.

Or, it shall be lawful to limit new uses, and afterwards the fine, &c. shall be to the new, and not to the old uses. Mo. 611.

Or, that after altering, changing, &c. said uses, the fine shall be to the uses newly limited, &c. Mo. 611.

So, if the words are, that by any deed he may alter, &c. and after such altering, &c. uses may cease, and, after such time, the feoffees shall stand seised to such new uses as shall be declared, &c. the party may revoke, and by the same deed limit new uses. R. 6 Co. 33.

If the power is in another deed, executed at the same time, it is tantamount as if it was in the same deed by which the uses are limited. 1 Vent. 279.

So, if the power be to revoke and limit new uses, he may revoke and limit new uses, with the like power *toties quoties*, which all spring out of the same settlement. R. 1 Sid. 343. R. 2 Rol. 162. l. 35. Semb. Lane, 119. Per B. R. upon a case referred by Harcourt Ld. Chancellor. Eq. Abr. 342.

But if a power of revocation be given, without mention of a power to limit

limit new uses, though he may revoke, he cannot limit new uses. 1 Vent. 198. D. Lane, 119. R. 1 Sid. 344.

So, if a power be given to revoke and limit new uses, and he revokes and limits new uses with power of revocation, and afterwards by a third indenture, revokes and limits other uses, the last uses are not warranted by the first indenture, from which all the uses spring. Lane, 119.

For if a man has power to revoke and limit new uses, he can make a revocation only once, if he does not give himself a subsequent power to revoke by the deed of revocation. 1 Co. 173. b. R. Eq. Abr. 343.

(L 4.) How a power of revocation shall be executed.

A person, who has a power of revocation, may shew his intent *tant rebus ipsis quam verbis*; and therefore, if the power be, that if he is determined to revoke, he by indenture may revoke and limit new uses, &c., and he, upon marriage with a second wife, covenants to stand seized to the use of himself and his second wife, and the heirs of himself, though there be no express signification of his determination to revoke, yet the revocation is good, and the new uses well limited. R. 2 Rol. 363. l. 10. 10 Co. 144.

What will be a good revocation, vide Poiar, (C 1, &c.)

So, if he by lease and release conveys to other uses, the former uses are revoked. R. 2 Rol. 263. l. 25. R. Cro. Car. 472. Jon. 393.

So, if a man, who has power of revocation by an indenture sealed in the presence of three witnesses, covenants by an indenture sealed in the presence of three witnesses, to levy a fine to other uses, and levies a fine accordingly; though he does not take notice of his power, it will be a good revocation; for though by itself the indenture, by which he covenants, does not make a revocation, because it does not pass any estate, nor raise any use, and the fine is no revocation, for it is not sealed before three witnesses; yet both make only one conveyance, and it is a good revocation. R. 2 Lev. 149. 1 Vent. 279. Ray. 239. Carth. 25.

So, if tenant for life, with such a power of revocation, levies a fine, and by deed, more than a month after the fine, declares the uses of the fine to himself in fee, it will be a revocation; for the fine and deed make one conveyance, and therefore the fine does not extinguish the power. R. cont. in B. R. but it was reversed in the Exchequer. Per six J. two cont. Carth. 22.

So, if he makes a lease for years to A. and a month after releases to him and his heirs.

So, if he releases to another and his heirs, and the lessee attorns; for the release does not enure as a grant, but as a declaration of uses. R. Jon. 393.

So, if the power be, that if he by writing signify and declare, in express words, his intent to revoke, &c. the uses shall be void, and afterwards he by his will, without taking notice of his power, devises the land to others, this will be a revocation, for his last disposition to different uses shews his intention to revoke. R. Ray. 301.

So, if an estate be limited to A. and the heirs male of his body, with a power to revoke, and the next day, reciting that he has given to A. and his heirs male, he revokes and limits to him and his heirs male, (with-

(without saying, of the body,) provided that he pay 1500*l.* to his daughter, it will be a revocation, though the estate given to A. is misrecited, and there is no reference to the settlement. R. Skin. 324.

If the power be to revoke, alter, and avoid, &c. and by deed he says, that his intent is to revoke, alter, or avoid, without saying that he doth revoke; yet it will be a good revocation. R. Mo. 681.

If a man recites his power imperfectly, and afterwards revokes, it will be good. R. 3 Lev. 218.

If the power be, that if he by writing, subscribed and sealed by him before two witnesses, signifies his intent to revoke, the uses shall cease, and by will, without taking notice of his power, he devises to other uses, it will be a revocation. R. Ray. 301.

If the power be to revoke by deed or will under hand and seal, a revocation by will, though not sealed, is good. 2 Rol. 262. l. 15. 3 Keb. 551. Win. 83.

If it be to revoke by deed, a revocation by lease and release is good, though they are two deeds. 1 Lev. 150. Vide Pojar, (C 3.)

If it is to revoke by writing under hand and seal, delivered in the presence of three witnesses, a revocation by will under hand and seal, published in the presence of three witnesses, is sufficient, though delivery seems intended of a deed. R. Hob. 312. 1 Vent. 280. R. Lit. 111. Win. 83.

If to revoke by writing under hand and seal, a fine with a deed to declare the uses is sufficient; for they make only one conveyance, though either of them by itself would be insufficient. 4 Mod. 265. Skin. 35.

So, a feoffment to such uses, though it is executed by livery, which is not in writing. Semb. Mo. 372. 378.

If he has power to revoke and limit new uses, which he does; if he afterwards revokes them, he must pursue all the circumstances of the first power. 1 Vent. 198.

So, a man, who has a power of revocation, may execute it for part of the land at one time, and for part at another time. Co. L. 237. a. R. 1 Co. 173. b. Mo. 618. R. 10 Co. 86.

So, he may execute it for part of the estate at one time, and part at another; as, for so many years at one time, and afterwards for the inheritance. 2 Rol. 263. l. 35.

So, he may revoke contingent uses, as well as uses *in esse*. R. 10 Co. 86. b. 2 Rol. 792. Q.

And by the same deed, by which he revokes, he may limit new uses; for the old uses cease *ipso facto* without entry or claim. Co. L. 237. a. R. 1 Co. 174. R. 6 Co. 32. R. Mo. 682.

And if he revokes without limitation of new uses, he will be seised in fee, as before, without entry or claim. Co. L. 237. a. R. 1 Co. 174. R. Mo. 605. 610.

If he has a power to revoke and limit new uses, he may limit new uses, with a power of revocation, and so *in infinitum*. 1 Vent. 198.

If, upon the first settlement, a remainder was limited to the king in fee, by a revocation by deed inrolled, the remainder in the king and the other estates are revoked. R. Jon. 393.

(L 5.) What

## (L. 5.) What not.

But if a man covenants to stand seised, &c. and by the same indenture covenants to levy a fine, and make other assurance to the same uses, and adds a proviso, that if he by writing, &c. revokes or otherwise limits, &c. any of the uses or estates created by the same indenture, then he shall stand seised to such uses, &c. ; if he levies a fine, or makes a feoffment to the covenantees for performance of the said covenants, to the uses in the same indenture generally, this does not amount to a revocation ; for it was intended only for a further assurance. R. 2 Rol. 795. l. 10.

When a defective revocation shall be aided in equity, vide Chancery (4 O 6.)

So, if a man, by subsequent deed, explains the intent of the former, as, if the uses by the first deed are declared to the mortgagee for security of money, and it is afterwards explained by another deed, that the mortgagor shall take the profits in the mean time, this does not amount to a revocation. R. 2 Rol. 793. l. 10.

So, if a man, who has a power of revocation, makes his will, and devises the same estate to others, though his intent appears to make a different disposition ; yet, if the will is not executed with all the circumstances of the power, it will not be a revocation. R. 3 Ca. Ch. 66. Vide infra.

The power of revocation is in the nature of a condition, and it cannot be effectual, if all the circumstances prescribed by the power are not pursued. R. 3 Ca. Ch. 66.

So, a power of revocation must be strictly pursued ; and therefore, if the power be, that he may revoke by deed indented, subscribed and sealed by him in the presence of three witnesses, all the circumstances must be observed. R. 10 Co. 144. a.

By a writing subscribed by three witnesses, a writing subscribed by two only is not sufficient. R. Lit. 23.

If it be that he may revoke by writing sealed and delivered before three witnesses, a will delivered before three witnesses is not sufficient, though sealing is not essential to a will. Hob. 312.

That by writing, &c. he may revoke and limit new uses, if he pleads that he enfeoffed A. to such uses, and avers that the feoffment was by writing, it is not sufficient ; for it does not appear that the uses are declared by writing. R. Mo. 370. 391.

If it be, that he may revoke by deed indented to be inrolled, this is the same, as by deed indented and inrolled ; for it will be no revocation till enrolment. R. 1 Co. 173. b.

Or, by deed inrolled in any of the king's courts, and a subsequent clause says, that from inrolment in chancery the uses shall be revoked ; if the deed is inrolled in B. R., yet the uses are not revoked till inrolment in chancery. R. 1 Co. 173.

If it be, that he may revoke upon tender of a guinea, if a deed is executed to other uses without tender of a guinea, it will be no revocation. 3 Ca. Ch. 70.

If a power be by indenture to revoke upon tender of 10s. to A., and by another indenture there is a power to revoke the uses of other land upon

upon tender of 10s. to A., tender of 20s. to A. to revoke the uses of both indentures is not good. R. 9 Co. 106. b.

If it be, to revoke upon tender to A. at Westminster, tender there, in the absence of A. and without notice to him, is not good. R. Mo. 602.

Yet the acceptance of the party may aid an improper tender; as if the power is to revoke upon tender of 12*d.* to A. in the Temple, and he tenders, and A. accepts it in another place. Per Powel, 3 Ch. Ca: 68. If A. be privy to the deed; otherwise, if a stranger.

So, a power of revocation, which depends upon a thing personal and individual, cannot be executed by another; as, if a man covenants to stand seised to uses, with a proviso, that if he is minded, and signifies his mind by writing under his proper hand and seal, &c. he may revoke, &c. and afterwards he is attainted of treason, the king cannot make a revocation. R. 7 Co. 13. a.

Or, if he be minded, and declare such his intent by writing under hand and seal. R. 1 Vent. 129. 1 Mod. 16. 1 Lev. 279.

Or, proviso, that if he tender a ring, &c. to the said W. declaring his intent to be to revoke; for it is personal. Dub. for the court was divided. Latch, 25. Jon. 134. Acc. 1 Vent. 129. 2 Rol. 393.

But if the power be to revoke upon tender of a gold ring, &c. and he, who has the power, is attainted of treason, the king may make the tender. R. 7 Co. 13.

And the king may depute others by letters patent to make the tender. 7 Co. 12. a.

And their tender and certificate to the exchequer is sufficient without office. R. 7 Co. 14. b.

And immediately upon the tender, the uses are determined and null. 7 Co. 14. b.

Yet the tender must be in the life-time of the person attainted. 1 Vent. 132.

So, if the power recites, that he being apprehensive that cestuique use may be prodigal, &c. and therefore he will keep the reins in his own hands, and intends, if he offers a ring with an intent to revoke, &c. the uses shall be revoked, if he is attaint, &c. the king may make tender of the ring, and thereby revoke; for the recital is only a flourish, and the tender is the substance. R. 7 Co. 13.

(L 6.) When a power of revocation will be extinguished or destroyed.

If a man who has a power of revocation, before execution of his power, makes a feoffment, levies a fine, or suffers a recovery of the land, it destroys and extinguishes his power. Co. L. 237. a. R. 1 Co. 112. R. 1 Co. 174. Vide Pojar, (D—E).—Ante, (L 1.)

And his power of revocation, as well as of limiting new uses, will be extinct. R. 1 Co. 112.

So, if he levies a fine, and afterwards by deed, with all the circumstances of the power, declares the uses of the fine, the power is extinct; for the power cannot be revived by a subsequent deed, which was extinguished by the fine before. Adm. 1 Vent. 280. R. per three J. Withens cont. 1 Vent. 363. 371. But this judgment was afterwards reversed by six J. against two in error, Carth. 23.

So,

So, if he makes a lease for life or other estate of freehold, this suspends the power, so that he cannot revoke during the life. R. 2 Rol. 263. l. 40. per one J., but dub. by another, if the power was not extinguished. 1 Vent. 42.

So, if he makes a lease for years, and levies a fine for confirmation of the lease, this suspends the power during the years. Mo. 618. (Vide infra.)

If he makes a lease for years, and the lessee attorns, and he a month after grants the reversion to the lessee, it will be a revocation; for though the lease suspends his power, the grant of the reversion does not enure as a grant, but as a declaration of a new use. R. Jon. 393.

So, if he releases his power to him who has an estate in the land, in possession, reversion, or remainder, the power is extinguished, and the estate defeasible by the power is made absolute. R. 1 Co. 113. a. 174. a.

Though the power be future, viz. to revoke after the death of B. without issue. Semb. 1 Co. 112. b.

So, a defeasance by the parties to the same deed may annul the power. R. 1 Co. 113. a.

But if a man has no interest in the land, nor will have by *cesser* of the estate, his fine or feoffment, being collateral to the land, does not extinguish his power; as, if A. upon a feoffment reserves a power to B. to make a revocation, &c. a fine or feoffment of the land by B. does not extinguish his power. Co. L. 237. a. 1 Co. 174.

Nor, his release. 1 Co. 174. a.

If A. covenants to stand seised to the use of the heirs male of his body by a second wife, and dies, a fine or recovery by his son and heir by the first venter does not destroy the power of revocation or the contingent uses. Adm. 2 Lev. 75.

So, if a man who has power of revocation, levies a fine, or makes a feoffment of part of a land, it extinguishes his power only for that part. R. 1 Co. 174. Co. L. 237. a.

But if a man, who has a power of revocation, makes a lease for years pursuant to a power in the same conveyance, this does not suspend his power of revocation as to the reversion. R. Mo. 788. Jon. 393. 1 Rol. 473. l. 10.

So, if he makes a lease for years not in pursuance of a power. Mo. 614. Per Walmsley. Mo. 618. Dub. Mo. 788. R. 2 Rol. 263. l. 30. Cro. Car. 472. Jon. 393.

So, if the power be to make another estate in fee or tail, a covenant to stand seised to the use of his wife for her life, does not alter his power. R. 1 Ch. R. 113.

So, if a man, having an estate for life, with a power of revocation, by deed covenants to levy a fine to such uses, and afterwards levies a fine accordingly, this does not extinguish his power, and the whole makes but one conveyance. R. 1 Vent. 279. Ray. 239. 2 Lev. 149. Skin. 35. 184.

[Wherever it appears that a satisfied term is still outstanding, and not assigned to the owner of the inheritance, he cannot sue at law for the premises, by ejectment or otherwise. 7 T. R. 43.]

[A satisfied trust shall be taken to be a trust for the benefit of the heir at law. 1 T. R. 760.]

(M) What

**(M) What uses are suppressed as superstitious.**

By the st. 23 H. 8. 10. (which was the first statute against superstitious uses) all feoffments, &c. to the use of parish churches, &c. to have perpetual *obits*, or find a priest, &c. are within the mischief of alienation in mortmain, and therefore all such or like uses above twenty years shall be void.

By the st. 1 Ed. 6. 14. all lands, rents, &c. to find stipendiary priests, &c. or for maintenance of anniversary *obits*, or like purposes, or any light, lamp in church, &c. shall be vested in the king; and if but part of the issues go to maintain such anniversary *obit*, lamp, &c. the king shall have the same in the nature of a rent-charge, &c.

Lands in tail, or for life, for such superstitious use, are within the statute, as well as estates in fee or for years, which only are mentioned. R. 4 Co. 106. b. Godb. 309.

So, lands given to a wife, &c. for such intent, and it will not be intended in consideration of blood, &c. R. 4 Co. 105.

So, land given to a son, upon condition, that if he does not find, &c. the feoffor may enter, though it is not said, to the intent to find. R. 4 Co. 107. a.

So, if land is given to a parson and his successor to find, and he leases for life, and with the rent finds, &c. till the st. 1 Ed. 6. made, the king or his patentee may enter. R. Dy. 337. b.

So, if land be given, that prayers be made for the soul of the deceased, it will be within the statute, which says, or like uses. R. 4 Co. 112, 113. 1 Rol. 417.

Though the prayers are to be made in Drapers' Hall, &c. and not in a church or chapel. 4 Co. 114. a.

Or, by the prisoners in Newgate, upon the anniversary of his death. 4 Co. 116. a.

Or, for maintaining a popish priest. 2 Vern. 266.

If land of 20*l.* per ann. is given to the intent to find a priest, &c. the whole shall go to the king, though only 10*l.* is to be paid to the priest. R. 4 Co. 109, 110. b. 113. b. 115. b. R. Mo. 191. 264.

So, if it be given to find a priest, and for twenty poor men, without ascertaining how much shall be to one, how much to the other. R. 4 Co. 111. 113. a. b.

Though 10*l.* was usually paid to the priest, and 10*l.* to the poor. R. 4 Co. 111. a. 113. b. R. Mo. 264.

So, if it be given, with 10*l.* to find a priest, and with the residue to supply an use depending thereon; as, the finding vestments, saying mass, &c. R. 4 Co. 112. 114. a. R. Mo. 129. 4 Co. 116. Latch, 38.

So, if it be given to find so much for one use, and so much for another (where all are superstitious), in whatever manner it is limited. R. 4 Co. 112. a.

Or, given to find a priest, and that he shall find a grammar-school, and for it shall have 10*l.* for his salary; for the good use is derived out of the superstitious use. R. 4 Co. 113. a.

If given to find a priest, who shall have 6*l.* per ann., and what remains to the repair of the church; for the superstitious use is certain, the good use uncertain. R. Cro. Car. 249, 456.

But

But if land of 20*l.* per ann. be given to the intent that the feoffees pay 10*l.* to a priest, only the 10*l.* is given to the king. R. 4 Co. 110. b. 113. b. R. Mo. 694.

Or, if it be given to find a priest, and that he shall have only 10*l.* per ann., and the rest shall be for the poor. R. 4 Co. 110. b. R. Mo. 131.

Or, given to raise 10*l.* for a priest, and to find vestments, &c. though it does not ascertain how much shall be for that purpose. R. 4 Co. 109. b. Mo. 131.

Or, Black Acre be given for an *obit*, and White Acre for the *obit* and poor; proviso, that if Black Acre does not raise 10*l.* for the *obit*, it shall be supplied from White Acre. R. Cro. Car. 249.

So, if by express words or implication, it appears that the residue was intended for the devisee. R. 4 Co. 116. b.

So, if the whole land was intended for a superstitious use, but only a part was conveyed for that purpose, that part only shall go to the king, though the whole was employed for that purpose. R. 4 Co. 115.

So, if land is charged with a rent of 20*l.* to find a priest, &c. the rent only shall go to the king. R. 4 Co. 110. b. 116. b.

So, if money be devised to a dean and chapter to find a chantry, and they oblige themselves to do it, and afterwards purchase land, and employ the profits for a priest, *obit*, &c.; but there is no settlement for such purpose; they are not given to the king. R. 2 Cro. 51.

If land was given to find an *obit*, &c. but none was found within five years before the statute of 1 Ed. 6. the land was not given to the king. Dy. 368. 4 Co. 114, 115.

So, uses limited since that statute are not thereby given to the king. Per Holt, M. 4 W. & M. 1 Sal. 163.

So, chantries in reputation, without colour of legal foundation, are not given to the king. R. 4 Co. 107. b. 108. b. 2 Cro. 51.

Otherwise, if there was colour of a good foundation, though it be defective. R. 4 Co. 108. a.

So, a devise upon a trust for a superstitious use, though it is void; yet it does not result to the heir, or to the king, but it shall be applied to a good use. R. 1 Sal. 163. 2 Vern. 266.

As, if it be for independent lectures. 2 Vern. 267.

Or, for presbyters to promote the discipline of the church of England in Scotland. R. 2 Vern. 266.

### (N) Charitable uses.

#### (N 1.) What are.—Relief of the poor.

But charitable uses were not given to the king, nor suppressed by the st. 23 H. 8. 10., nor by the st. 25 H. 8. 26 H. 8. or 28 H. 8. which take away the authority of the pope, nor by the st. 27 H. 8. 31 H. 8. 37 H. 8. or 1 Ed. 6. 14. which suppress abbies, chantries, &c. R. 1 Co. 24. Porter, R. 4 Co. 111. a.

And therefore, by the st. 43. El. 4. commissioners may be to inquire of and redress the misemployment, &c. of lands, goods, &c. given for the charitable and godly uses therein rehearsed.

And in the same statute it is allowed, for a good and charitable use,  
if

if lands, goods, &c. are given, &c. for the relief of aged, impotent, and poor people. 1 Co. 24. a.

So, if the gift be to the poor of such a parish, without saying, that they are aged or impotent; for poverty of itself is sufficient. Duke, 132.

Or, to such an hospital. Ibid.

Or, to all not assessed to the subsidy; for they are poor. Ibid.

So, in whatever manner the relief be; as, if it be to provide bows and arrows for the children of the poor; for it is an easement to the parent, who ought to find them. Ibid.

For erecting cottages for the poor, with four acres of land to each. Ibid.

For making conduits to alms-houses. Ibid.

For building an house in which they may take alms. Ibid.

Or, maintaining a common laundress in an hospital, &c. Duke, 132.

Or, a chaplain for prayers, &c. Ibid.

So, for providing arms for their defence. Ibid.

Or, increase of diet upon festivals, &c. Duke, 133.

But it shall not be allowed for a good use, if it be for relief of all the aged and impotent in such a parish; for that comprehends the rich as well as the poor. Duke, 132.

Or, to the poor in general. Ibid.

Or, to the religious, when the time permits, and in the interim for the poor. Duke, 133.

So, if it be for weapons for the poor: for they are not necessary. Duke, 132.

For putting up seats for begging; for it is unlawful. Duke, 133.

Yet the chancery may settle such uses as the commissioners, by the st. 43 El. cannot. R. 2 Lev. 167.

[If one grants a rent-charge of 20*l.* per ann. for a charity, toward the support of poor old men, and then grants the lands, &c. to A. and his heirs, the heir of the grantor of the charity, and not the grantee of the lands, shall nominate the old men. 3 P. W. 145.]

## (N 2.) Soldiers or mariners disabled.

So, by the st. 43 Eliz. it is rehearsed, and will be allowed for good, if the gift be for the maintenance of sick and maimed soldiers and mariners. 1 Co. 26. a.

So, if they are sick or maimed, in the disjunctive. Duke, 134.

If he served as an officer or common soldier, priest or volunteer. Duke, 133.

As, a servant, victualler, artificer, pilot, &c. in a merchant's or king's ship. Duke, 133.

Though the soldier or mariner be an alien. Ibid.

But the statute does not extend to soldiers beyond the time of their sickness. Duke, 134.

To the wife, issue, or servants of a disabled soldier or mariner. Duke, 133.

To bargemen, wherry-men, owners of, or passengers in, a ship. Duke, 133.

Nor victuallers, &c. who voluntarily attend the army. Ibid.

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If he be maimed in a foreign ship or service. Ibid.  
Or, by way of punishment for an offence. Duke, 134.

## (N 3.) Schools.

So, if a gift be for schools of learning, free-schools, or scholars in the university. 1 Co. 26. a.

Schools for writing, languages, music, mathematics, &c. for they are schools of learning.

If it be for furniture, &c. of the house, &c. provision for the master, usher, &c. Duke, 134.

But the statute does not extend to schools for dancing, fencing, &c. Ibid.

Or, for instructing in the catechism; for this is a matter of religion. Ibid.

Or, such as are not free-schools. 2 Vern. 387.

Nor, to a gift for scholars in any other place than Oxford and Cambridge; as, in the college of physicians. Duke, 134.

Or, in Oxford, Cambridge, or elsewhere, at the discretion of the feoffees. Ibid.

## (N 4.) Bridges, &amp;c.

So, if a gift be for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways. 1 Co. 26. a.

And such gift will be good, though another be bound by covenant or prescription to repair.

If the gift be for the repairing of a common pond or watering-place. Duke, 135.

For lights to direct ships to the haven. Ibid.

## (N 5.) Orphans.

So, if a gift be for preferment and education of orphans. Duke, 135.

Or, of a bastard; for he has no parent. Ibid.

So, if it be for horses to instruct orphans, who hold in chivalry, to ride. Duke, 136.

And a woman continues an orphan, though married, till age of consent. Duke, 135.

But a servant or apprentice is no orphan; for his master is *in loco parentis*. Ibid.

## (N 6.) House of correction.

So, if a gift be for the relief, stock, or maintenance of a house of correction. 1 Co. 26. a.

Or, for building a house of correction. Duke, 136.

## (N 7.) Poor virgins.

So, if a gift be for the marriage of poor maids. 1 Co. 26. a. Cro. Car. 525.

Or, for a wedding dinner, or apparel for them. Duke, 136.

And it shall be allowed to such as are poor, though they have wealthy relations. Ibid.

But not to those who have rich parents, or legacies. Ibid.

Or, marry against their parents' consent. Ibid.

Or,

Or, are incontinent. Ibid.

So, provision for a wedding-ring for a poor virgin will not be a good use; for the husband ought to provide it. Ibid.

(N 8.) Decayed tradesmen.

So, if a gift be for the support of tradesmen, handicraftsmen, and persons decayed. Duke, 136.

As, if they become decayed by negligence, fire, fraud of servants, &c. Ibid.

Bankrupts in custody after submission to the laws. Ibid.

But the statute does not extend to tradesmen set up above five years. Ibid.

Nor, to bankrupts who abscond. Ibid.

Or, persons in decay by suretyship, &c. Ibid.

(N 9.) Prisoners and captives.

So, if it be for relief or redemption of prisoners or captives. Cro. Car. 525.

As Christians captive to the Turks. Duke, 136.

Persons in execution, or upon *præmunire*. Ibid.

But the statute does not extend to persons captive to a christian prince in war. Ibid.

To persons in prison for contempt. Ibid.

Nor, to the wife or issue of a prisoner. Duke, 137.

(N 10.) Aid of poor inhabitants, &c.

So, if a gift be for the aid and ease of poor inhabitants, in payment of fifteenths, setting out soldiers, or other taxes. 1 Co. 26. a.

So, if it be to make hue and cry, watch and ward, &c. Duke, 137.

Other charities not superstitious.

But the statute does not extend to a gift for discharge of subsidies; for they are not paid by the poor. Duke, 137.

Nor, for discharging fines for escape, robbery, &c. Ibid.

So, if a gift be for the provision of a preacher, &c. it will be a charitable use within the equity of the statute. R. Poph. 139. Duke, 32. 109.

So, a gift for the maintenance of a chaplain or priest for divine service will be a charitable use, and in the direction of Chancery, though not within the power of the commissioners. Duke, 109. 2 Lev. 167.

So, a gift for a lecture or sermon. 2 Ca. Ch. 18.

For sixty ejected ministers. R. per commissioners 1689, and decree cont. reversed. 1 Ver. 249, 250. 2 Ver. 105.

[A grant upon condition to repair a vault and tomb, and permit the same to be used as a family vault for the grantor and any of her family, is, as far as concerns the grantor's own interest, not a charitable use; as far as concerns her family, it is. 3 M. & S. 407. 2 Mars. 61. 6 Taunt. 359.]

[Devise to A. for life, on condition that he convey the premises forthwith to trustees for the use of a religious house, of which he is the preacher, to take place at his death; the testator expecting that he would do every thing for carrying on the work of God in the said religious house, both in his life-time and after his decease. Held, that the life

estate to A. was not a devise to a charitable use, and therefore not void under st. 9 Geo. 2. c. 36. though the subsequent devise was. 4 T. R. 264.]

(N 11.) What shall be a good appointment to a charitable use.

If lands or goods are given, limited, appointed, or assigned to a charitable use, it is sufficient, though it be not pursuant, in all respects, to the direction of the law; as, if the gift be to persons not capable by law to take; as, if land be devised to the churchwardens of D., though they cannot take lands. Duke, 115. 139. Vide Chancery, (2 N 2.)

Or, to the parishioners of D. or the parish of D. Duke, 139, 140.

Or, parson and churchwardens to sell. Duke, 81.

Or, parson and his successors, though he is no corporation. Duke, 139.

So, if it be to the poor of an hospital, though they are not incorporated. Duke, 81. 115.

So, if 10*l.* per ann. be given for a sermon in A. without saying to whom. R. 2 Ca. Ch. 18.

So, if it be to a corporation, which is misnamed. R. Ca. Ch. 267..

Or to a corporation to the use of another; though a corporation cannot be seised to an use. Duke, 81. 138.

To an idiot, feme-covert, bankrupt, recusant, &c. Duke, 138.

To such charitable uses as he had by writing directed, and no such writing is found, it will be a good appointment, and the king may direct the application upon a bill in equity. R. 1 Ver. 225.

So, if he gives the surplus of his estate for the good of poor people for ever, without saying whom. 1 Ver. 225.

So, if a gift or appointment be made to a charitable use by an improper conveyance; as, if land was devised before the st. 32 & 34 H. 8. though not devisable by custom. Per two J. Mo. 889.

If a rent be reserved to A. for the use of the poor, though A. is a stranger. Duke, 140.

If a copyhold be given to the use of the poor, &c. though there is no surrender. R. Mo. 890. Ray. 249. 2 Ver. 454.

If a devise was by a feme covert, of goods, which she has as administratrix; for an administrator had the goods to dispose *in pios usus*. R. Mo. 882. 2 Ver. 454.

So, if by voluntary agreement between mariners 4*d.* a month be allowed out of their wages for maimed mariners, it will be a good limitation within the statute. R. Mo. 889.

If a term be devised to A. for life, remainder to charitable uses, though there can be no remainder of a term. Duke, 140.

If a devise be by tenant in tail before a recovery suffered. Ray. 249. R. 2 Ver. 453. Vide Chancery, (2 N 2—4 S 2.)

So, it will be good against him in remainder. R. in Chanc. 2 Ver. 755.

So, if a woman settles land with a power of revocation, and gives instructions in writing for a settlement to charitable uses, but dies before the settlement, it shall be a good appointment, though no revocation. Eq. Ca. 138.

But

But a disposition to a charitable use by him, who has not ability to grant, shall not be decreed; as, by an idiot, lunatic, &c. Duke, 114. 138.

By an infant, feme-covert, &c. 3 Ch. R. 152. Duke, 138,

By a bankrupt. Duke, 138.

So, if a daughter gives lands to a charitable use, which she has by descent, if there was no trust in her father so to dispose, an after-born son may avoid it. Duke, 138.

So, a devise to a charitable use by a tenant *in capite* will be void for a third part. R. Ray. 249. R. Cro. Car. 525. Cont. 2 Ver. 454.

So, a devise by a nuncupative will, will be void; for the st. 29 Car. 2. has repealed the st. 43 El. 4. *pro tanto*. R. 1 Sal. 162. Eq. Ca. 44.

Though made before the st. 29 Car. 2. if the testator died after. 1 Sal. 163. Semb. 3 Ch. R. 153.

So, a devise by a will, not executed in the presence of three witnesses, since the st. 29 Car. 2. will be void, though it be to charitable uses. R. 2 Ver. 598.

[There must be a will duly executed to create a charitable use, and Chancery will not set up a trust for a charity without a declaration in writing; for charitable uses are within both the clauses of the statute of frauds, the clause of devises, and the clause of declarations of trust. 3 Atk. 141.]

So, a devise that land shall be sold for payment of legacies, the residue to charitable uses, is not a disposition of the land itself. R. Cro. Car. 526.

So, a devise with remainder to charitable uses, with intent to create a perpetuity, shall not be decreed. 1 Ver. 161, 162.

[Dispositions of lands and for charitable uses, when and how to be made. 9 G. 2. c. 36. *infra*, (N 13.)]

[The statute of mortmain 9 Geo. 2. c. 36. requires that the grant shall effect in possession. A grant which by the terms thereof takes the effect in possession satisfies the act, though, in point of fact, the grantor remains in the receipt of the rents and profits till his death, unless his remaining in possession was a tacit condition when the grant was executed. 3 M. & S. 407.]

[The mortmain act, 9 Geo. 2. c. 36. requires the grant to be without any reservation, trust, condition, or limitation for the benefit of the donor or person claiming under him; otherwise the grant is void. The object of the statute was to prevent a reservation, under colour of a charitable use, of some substantial benefit to the donor himself; and therefore, held that a grant upon condition to repair a tomb, and permit the same to be used by grantor and family, and in default, then over to other trustees, was not touched by the act; the reservation was only in furtherance of the trust. 3 M. & S. 407.]

[A. conveys a farm, with a meeting-house and burial ground, vault and tomb thereon, to B. and C. in trust, as to the meeting-house and burial ground, to permit a society of quakers to use the same as long as they should pay the rent of 2*l.* 10*s.* and keep them in repair; and after the determination of that estate as to the meeting-house and burial ground, and from the execution of the conveyance as to all the other property, and during the continuance of the said estate as to the rent

to B., in trust to keep the vault and tomb in repair, and to permit them to be used for the interment of A. and her family; and after the determination of that estate to C., his heirs, and assigns for ever, provided that the said society might take part of the farm to build a new meeting-house, if necessary. Held, that though the grant of the meeting-house and burial ground was void by the statute of mortmain, 9 Geo. 2. c. 36., yet that the deed of conveyance was not therefore wholly void. 2. That the limitation of the vault and tomb was not a charitable use. And therefore and because, 3. No part of the land could be taken for the purpose of building a new meeting-house, (the grant of the present meeting-house having been determined to be void) the conveyance of all, except the meeting-house and burial ground, was good. 2 Mars. 61. 6 Taunt. 359. 3 M. & S. 407.]

#### (N 12.) How expounded.

A gift or appointment to a charitable use shall be liberally expounded; and therefore, where land of such a value is devised, the whole shall be employed, though the value is improved. Vide Chancery, (2 N 1, &c.)

If a manor is charged with 1000*l.* to put out apprentices in such parish as his executors shall appoint, though the 1000*l.* is paid to the executor of the donor, the manor is not discharged till it is vested in trustees for the intended charity. R. Ch. R. 187.

[If there be a devise of the whole profits of an estate to charities, the charities shall have the increased rents. Ambler, 190.]

[If there be a devise to pay debts and annuities, to build a house for six poor people, and to pay them 2*s.* 6*d.* a week each, after debts paid; if there be a saving and increase of rents, they shall go to the charity. Id. 201.]

[A devise to establish a Jesuba to instruct in the Jewish religion, was held not to be supportable in that mode, but good as a charity, to be disposed of by the crown. Ibid. 228.]

[If a legacy be given to the poor inhabitants of St. Leonard, Shoreditch, it shall go to the poor not receiving alms. Id. 422.]

[If a legacy be given to the poor, and it appear that the testator was a French refugee, the court will direct it to be given to poor refugees. Ibid.]

[A devise being given in augmentation of the charitable collection for poor dissenting ministers living in any counties in England, and it being proved that there were three distinct societies of dissenters; it was held that the devise was good, and should go to the poor ministers of each. Id. 524.]

[If there be a devise of a residue in trust for charitable uses, without specifying any, the bequest is good, and the crown may appoint the uses. Id. 712.]

#### (N 13.) By whom the appointment may be.

Every one having ability to make a grant or devise, may appoint to charitable uses. Vide ante, (N 11.)

So, where an intestate had *bona nabilia*, after administration granted and an inventory exhibited, upon citation of the administrator, the judge of the ecclesiastical court might direct a particular sum, according

cording to the circumstances of the estate, to such charitable uses in particular as he pleased. 4 Inst. 336.

And this was to be done by public act of the court without fee, and then the administrator was bound to do it. Ibid.

### [(N 13.) How appointed.]

[By st. 9 Geo. 2. c. 36. after June 24th 1736, no appointment shall be made of any manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, nor of any sum of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatever, to be laid out in the purchase of any lands, tenements, or hereditaments, to any person, body politic, or corporate, or otherwise in trust, or for the benefit of any charitable uses whatever; unless in the case of lands, &c. and personal estate, (except stock in the public funds,) such appointment be by deed indented, sealed, and delivered in the presence of two or more creditable witnesses, twelve calendar months at least before the death of the donor or grantor, (including the days of the execution and death,) and inrolled in chancery within six months next after the execution; and in the case of stocks, unless the transfer be made in the public books six calendar months at least before the death of the donor or grantor (including the days of transfer and death); and unless such appointment be made to take effect in possession for the charitable use intended, immediately from the making thereof, without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatever, for the benefit of the grantor or of any claiming under him. s. 1.]

[Any grant, &c. made in any other way to be absolutely void. s. 3.]

[This not to extend to prejudice any college in either of the two universities, nor the colleges of Eton, Winchester, or Westminster, provided that no college shall hold more advowsons than shall be equal to a moiety of their fellows in number. s. 4 & 5.]

[If a man by will give 500*l.* out of his personal estate to trustees in trust to lay out part in building a school-house, and school-master's house, and direct that the purchase of the ground and the expence of building shall not exceed 200*l.*, and that the remaining 300*l.* be laid out in land or real security for the master's maintenance, the last is void by this statute, and ground may not be purchased with the 200*l.*; but if the parish have lands, it may be laid out in building on them. 3 Atk. 806. 2 Ves. 547.]

[If a man give a legacy to his executors, and then devise a copyhold to A. he paying the executors 1000*l.*, and give the residue of his estate to a charity, this 1000*l.*, is a charge on the real estate, and the devise of it void by the statute. 1 Ves. 108.]

If a man give his real estate to trustees to sell, and with the produce and his personal estate to pay debts and legacies, and (*inter alia*) to purchase freehold land for a fund for an annuity to preach a sermon and to keep a tomb-stone in repair, it is within this statute, and void. 1 Ves. 320.]

[If mortgagee in possession under *hobere facias* devise all money  
Q q 4 due

due on the mortgage to a charity, though the heir at law of mortgagor insists to redeem, it is within this statute. 2 Ves. 44.]

[But if by his will, before the statute, he had devised lands to trustees for a charity, and by codicil made after the act, devised the same and other lands, to the same and other trustees, and under the same trusts; and made alterations in other parts of his will, and confirmed the rest, the lands devised by the will are not within the statute. 1 Ves. 178. 186.]

[And if a man devise the residue of his real and personal estate to A. for life, &c. and then to trustees to erect an hospital; as to his real estate it is void, but not as to the personal, though he had mortgages; and to erect means to found as well as to build. 2 Ves. 182.]

[If a testatrix bequeath a sum of money to be laid out under the direction of the minister and churchwardens for the purpose of erecting a free-school within the parish, it is void, though there be a piece of waste land in the parish on which an old building stands, which has formerly been a free-school. Ambler, 751.]

[Testator gave all his real and personal estate in trust, that a commodious and proper house should be taken on lease, at such yearly rent as should be agreed on, or otherwise, as the trustees should think fit, as a school; and that the children and grand-children of some of his relations should be placed there from the age of seven to fourteen, then to be put out apprentices; also, that such other children as the trustees should think fit should be placed at the same school; and he directed an inscription, visitation, &c. This trust held void under the act as to the general purpose of a permanent charity; but good as to the particular bounty to the relations to the extent of children and grand-children of such of the stocks specified, as were in being at the testator's death; and while the school was kept open for them, that other children might be educated there. 2 Ves. jun. 238.]

[The stat. meant to prevent the adding to land already in mortmain. Ibid. 241.]

[Charitable bequest of money due on mortgage void. 2 Ves. jun. 279.]

[Distinction between the stat. of mortmain and the 12 W. 3. c. 4. concerning Roman Catholics: the former has the words "charge, or incumbrance," which are not in the latter. Ibid. 283.]

[A. devised to B. preacher of the meeting-house of C. for life, on condition that he should convey the premises to trustees, to take place after B.'s death, for the use and support of the preaching of the word of God at the meeting-house for ever, and in case the preaching there should be discontinued, then over to a charity-school: it was holden that B. took an estate for life, though the devise over was void under the statute. 4. T. R. 264.]

(N 14.) Jurisdiction for charitable uses.—By commission.

How relief shall be in chancery for charitable uses, vide in Chancery, (2 N 1, &c.)

[The court, on an information of attorney-general, may direct the election of a master of a free-school of royal foundation, and this is not interfering with the visitatorial power. Bunb. 215.]

By the st. 2 H. 5. 1. the ordinary shall inquire of and reform the govern-

government of hospitals of the king's foundation by commission, and return the inquisition taken thereon into chancery, and other hospitals *ex officio*.

By the st. 39 El. 9. commissions might be awarded to inquire of lands or goods given to hospitals or charitable uses, &c. But this is repealed by 43 El. 9.

By the st. 43 El. 4. lord chancellor, &c. may award commissions to the bishop of the diocese, his chancellor, and others, &c. or any four of them, to inquire by the oaths of twelve men, or other lawful means, of all gifts, &c. to the charitable uses there specified, and of all abuses, misemployments, &c. of lands, goods, &c. given to the said charities; and after inquiry, &c. calling the parties interested, to set down such decrees, &c. that the lands, goods, &c. may be duly employed for the charitable uses for which given.

And all decrees, &c. shall be certified into chancery, under the seals of the commissioners in the time limited by the commission; and shall stand good till altered by the lord chancellor on complaint by party grieved.

So, the king himself may name commissioners, or sign the commission, as well as the chancellor. Duke, 144.

Or, commissioners of the great seal. Cont. per Mo. Duke, 144.

The commission must be under the great seal. Duke, 144.

And conform to the words of the statute. Duke, 146.

It must be awarded to the county where the land lies. Duke, 145.

Or, where goods are to be employed. Duke, 149.

If land in one county is given in charitable uses in another, there must be several commissions to both counties. Duke, 145. 148, 149.

So, if the land lies in several counties. Duke, 145. 148.

Or, the rent issues out of land in several counties. Duke, 145. 148.

So, if the lands or goods are in a county palatine and the employment out of it, or *vice versa*, there must be commissions under both seals. Duke, 145.

#### (N 15.) Who may be commissioners.

There must be five commissioners at least. Duke, 146.

And the bishop of the diocese, if he is *in esse*, must be a commissioner, otherwise it will be void. R. per four J. Duke, 63.

But a bishop elect need not be named a commissioner, if he be not consecrated. Duke, 145.

Nor, a suffragan. Duke, 145.

Nor, a consecrated bishop, if he is concerned in interest; as, if goods of an intestate, given to charitable uses, are in his hands as ordinary till administration granted. Duke, 145, 146.

So, if the bishop is named, the other commissioners may act without him. Duke, 63. 117. 145.

So, any one of good fame may be a commissioner. Duke, 117. 145.

So, an alien friend may be a commissioner. Duke, 145.

So, a person indicted for a petty misdemeanor; as, a riot, &c. Duke, 145.

Outlawed, if the outlawry be reversed; for that disaffirms the outlawry. Duke, 146.

Citizen or burgess, though the charitable use is for the benefit of the city or borough. Duke, 147.

But by the st. 43 El. 4. commissioners ought to be of good and sound behaviour; and therefore a person, convicted of treason, felony, or misprision, cannot be a commissioner.

Nor, one convicted for cosinage, barrettry, simony, &c. Duke, 145.

Or, for acquitting of a felon, against evidence, when he was a juror. Duke, 145.

Nor, one outlawed or excommunicated at the time of the commission, though afterwards pardoned or absolved. Duke, 146.

Nor, an infant at the time of the commission; though he afterwards comes to full age. Duke, 146.

So, a person interested cannot be a commissioner; as, an executor or administrator of the goods given. Duke, 146.

Or, any one who claims the reversion or remainder of the lands given. Duke, 146.

Nor, a member of a particular corporation, to whom the charity is given; as, one of the mercer's company, &c. where the gift is to such company. Duke, 147.

(N 16.) What inquisition shall be good.—As to a gift to a charitable use.

So, commissioners may make inquiry by all lawful means of all gifts, &c.

And therefore, inquiry, by examination of witnesses, rentals, accounts, prior inquisitions, as well as by jury, will be good. Duke, 150.

Or, by the commissioners' own knowledge. Duke, 150.

And an inscription upon the tomb of the donor of a charitable use is sufficient.

And by such means they may supply a defect in the finding of the jury in the circumstances of the gift; as, that a gift for poor tradesmen was for such sort of tradesmen. Duke, 150.

That the misemployment found was for so long time. Ibid.

And it is sufficient if twelve jurors agree, though sixteen are impanelled. Ibid.

So, an inquisition will be good, though it does not find all the circumstances of the gift, if the substance be found; as, if the gift be found *quibusdam ignotis*, or *per quendam ignot.* Duke, 149.

So, if it finds a gift variant in circumstances from the truth; as, if it be found to be made by fine, feoffment, &c. when it was by will, or other conveyance. Duke, 149.

So, it is sufficient if the inquisition finds the general use, though it varies from the particular; as, if it finds a gift for books for poor scholars, when it was for gowns for them; for the gift for poor scholars is the general use. Ibid.

Or, for stones for the highway, where the gift was for gravel. Ibid.

Or, finds a gift for poor scholars generally, where it was for two poor scholars in the university. Ibid.

Or, a gift for such an use, where it was for such and other uses, it is sufficient for so much. Ibid.

(N 17.) What

## (N 17.) What not.

But the inquisition must be taken within the county where the land lies. Duke, 119, 120. 148, 149.

Or, where the commissioners have authority. Duke, 148.

If the land lies in several counties, there must be inquisitions taken in all. Ibid.

Or, if the commission goes only to one, an inquisition may be taken afterwards upon another commission in the other. Ibid.

So, the commissioners cannot inquire by the oath of the party himself. Duke, 150.

Or, by illegal evidence; as, a deed cancelled, a record reversed, &c. Duke, 150.

So, an inquisition must find the gift, and also the abuse, otherwise it will be imperfect. Duke, 149.

It must find the general use truly, otherwise it is void; as, if it finds a gift for poor scholars, where it was for soldiers. Ibid.

Or, a gift for a highway, which was for poor virgins. Ibid.

## (N 18.) As to misemployment.

So, by the st. 43 El. 4. commissioners may inquire of all abuses, breaches of trust, negligences, misemployments, not employing, concealing, defrauding, misconverting, or misgoverning of any lands, goods, &c. given to any charitable uses before rehearsed.

And therefore, every misemployment, or misgovernment, and every neglect of employing, or the defrauding of the charity, is inquirable. Duke, 115.

If the trustee leases at an undervalue. R. 2 Ver. 414, 415.

So, if a man to whom land is devised for a charitable use by covin with the heir waives the devise, it is a fraud inquirable. Duke, 150.

So, if the heir refuses a legacy for discharging a mortgage that the land may be settled. Ibid.

If a husband by covin disagrees to a gift to his wife. Ibid.

If the feoffee to a charitable use aliens in mortmain, and afterwards purchases the land of the king. Ibid.

If the grantee of a rent for a charitable use by covin with the tenant grants the rent to him. Duke, 153.

## (N 19.) What cases are exempt from the inquiry.

But by the st. 43 El. 4. it is provided, that the said act extend not to lands, goods, &c. given to a college, hall, or house of learning, in the universities of Oxford or Cambridge, the colleges of Eton, Westminster, or Winchester, or any cathedral or collegiate church.

So, if a gift be to the university itself, it will be exempt. Duke, 171.

So, by a proviso in the same statute, it does not extend to lands, &c. given to or in any city or town corporate, where a special governor is appointed to direct the disposal.

Nor, to any college, hospital, or free-school, which has a special visitor, governors, or overseers appointed by the founder.

And this proviso extends to the company of mercers, grocers, &c. in London. Duke, 171.

To a gift made to a corporation, to be employed in another corporation. Duke, 172.

Or, to be employed by the mayor in the same corporation. Ibid.

To a gift to an hospital in reputation, which has a governor; as, to the poor knights of Windsor; for the dean and canons of Windsor are their governors appointed by the founder. Ibid.

But the proviso does not extend to a gift to a corporation not *in esse* at the time of the act. Duke, 171.

Or, to a gift made since the act to a corporation which was then *in esse*. Ibid.

Nor, to goods given to a corporation; for the statute speaks only of lands and tenements. Ibid.

Nor, to land given to a member of a corporation, &c. and not given to the corporation. Duke, 172.

Or, a gift to a corporation, which is not to be employed there, or in another corporation. Ibid.

[If lands are given to trustees, governors of a college, hospital, or school, for the use of it, and a special visitor is appointed, or one by operation of law, the commission shall not interpose; but, if the lands are given to such governors on a collateral charity (as to mend roads); it may. 2 Ves. 551.]

Or, when the governors, &c. of the corporation have no power to enforce the employment to the charity; as, if the gift is to a college to pay 20*l.* to the parson of D. to be distributed amongst the poor of D.; for the visitor, &c. cannot compel the parson to make distribution. Duke, 172.

So, if the governor, &c. has no power to enforce the employment of the whole, but only part of the charity, it will be exempt for the whole. Duke, 172.

So, by a proviso in the same statute, no person, who purchased for valuable consideration without fraud, and without notice of the charitable use, shall be impeached, &c.

And therefore, the commissioners have no authority to make a decree against a purchaser for valuable consideration without fraud or notice; as, for money paid, plate given, &c. Duke, 177.

Land, rent, lease, ward, or title to land conveyed, &c. Ibid.

So, if a debt, &c. is released, &c.; for it is a valuable consideration. Ibid.

If rent, or a fine, is paid upon a lease made. Ibid.

But it is no valuable consideration, if a man gives for the purchase of things of pleasure, though valuable; as jewels, &c. Ibid.

A mere possibility in land, &c. Ibid.

Money only to part of the value. Ibid.

So, if the consideration is mixt; as, for money and affection. Ibid.

In consideration of money and marriage. Ibid.

So, if the consideration is executory. Duke, 178.

Or, for payment of debts of the vendor, or portions for his daughters. Duke, 177, 178.

So, a lease to the full rent is not a deed upon a valuable consideration. Duke, 178.

And the commissioners are not to be satisfied by the mention of the consideration in the deed, &c. Ibid.

So,

So, if a gift be to the poor, &c. generally, without mention of any particular place, the commissioners have no authority therein, but it must be settled in chancery. Per Finch, 2 Lev. 168.

(N 20.) Decree by the commissioners.—Who shall be summoned by them.

The commissioners, before a decree made by them, ought to summon all persons concerned in interest. Duke, 117. 151.

(N 21.) By what commissioners it shall be made.

The decree must be made by such commissioners as were present when the inquisition was taken. Duke, 154. Cont. Duke, 68. 118.

(N 22.) How the decree shall be made.

The decree must direct the employment of the goods or lands according to the intent of the donor; and therefore, if some of the lands are given for the repair of the church, others for the relief of the poor, &c. the profits cannot be employed promiscuously; but the rents of each estate shall be applied to the particular use for which it was given. R. 1 Ver. 43. Per Mo. Duke, 158. Vide Chancery, (2 N 4.)

If the gift was to persons of such sex, nation, trade, quality, or profession, the decree must be conformable to it. Per Mo. Duke, 158.

If the gift fixes the number of persons who are to take, the decree must not alter it. Per Mo. Duke, 157.

If it appropriates it to a parish, prison, school, &c. the decree cannot vary it. Per Mo. Duke, 158.

Or, to a particular purpose; as, for diet, apparel, house of correction, ease of fifteenths, &c. the decree cannot direct it for other purposes. Per Mo. Duke, 158. 160.

Though the land be increased to a greater value. R. 11 Car. Duke, 68.

(N 23.) Who are bound by the decree.

All shall be bound by the commissioners' decree whom the donor by his act or conveyance could bind; as, he who claims title under the donor by descent. Per Mo. Duke, 160. R. Ch. Ca. 267.

But persons who claim paramount the gift or devise to the charity, are not bound by the decree. R. Ch. Ca. 267.

(N 24.) It must be certified to chancery.

Every decree by commissioners must be certified to the chancery. Per Mo. Duke, 164.

(N 25.) Exceptions to the decree.

The party grieved by the decree may take exceptions to it before the chancellor. 1 Ver. 42.

So, after exceptions by a lessee over-ruled, his lessor may take exceptions to it. 2 Ver. 507.

So, after a decree twice confirmed, upon a rehearing an issue may be directed to try the fact. 2 Ver. 507.

(N 26.) Chan.

(N. 26.) Chancery may confirm and make execution.

If a decree by commissioners be certified, and there is no exception by the party aggrieved within a reasonable time, he shall be concluded thereby without more. Ch. Ca. 194.

If exception be taken and disallowed, the decree shall be confirmed.

After confirmation the chancellor may award execution in what manner he pleases. Per Mo. Duke, 166.

The most usual course is, to make a writ of execution upon the statute, and afterwards an attachment, and then he shall be imprisoned till performance. Ibid.

Or, he may award an *elegit* or *feri facias*. Ibid.

So, if the decree transfers the property of the land or goods to another, he to whom decreed, may take or enter without a writ of execution. Per Mo. Duke, 164.

If it decrees a lease to be void, he in reversion may enter. Ibid.

If it decrees a deed, &c. to be delivered, it may be delivered without a writ of execution. Ibid.

If a rent to be discharged, it may be executed by way of retainer. Per Mo. Duke, 164.

(N. 27.) Or enlarge or annul it.

But, if the decree appears to be out of the power of the commissioners, contrary to the statute or common law, or ecclesiastical law, or intent of the donor, the chancellor may annul it. Per Mo. Duke, 164. Eq. Ca. 65.

So, upon a suggestion, without bill, it may be annulled if made without authority; as, if the precept was only by three commissioners; or there was no inquisition. Per Mo. Duke, 163, 164.

So, if the exception taken be allowed, it shall be annulled.

But, if the decree is only voidable, it shall not be annulled without bill. Per Mo. Duke, 163.

As if the party was not summoned, or a legal challenge disallowed, &c. Ibid.

So, if a suggestion is made, it must be proved immediately, otherwise execution shall not be stayed. Per Mo. Duke, 165.

So, execution shall not be stayed, if the matter suggested is only irregularity; as, disproportion in allowances. Per Mo. Duke, 163.

So, it shall not be annulled for matter arising after the decree; as, if assets fail after a decree against an executor or administrator; for it was his default it was not performed before. R. Mo. 823.

So, if the commissioners by decree direct payment of 85*l.*, the chancellor may increase it to 170*l.* R. 5 Car. Duke, 32.

If commissioners are designedly vexatious, chancery may punish them; but otherwise they pay no costs. Eq. Ca. 65.

The decree by chancery shall be final, and no appeal lies to parliament. 2 Ver. 118.

Nor, shall there be a rehearing upon it. Semb. 2 Ver. 118.

But chancery, after a decree which takes away a trust from a corporation for not paying 4000*l.* to a charity, may, upon payment, revest the trust in them, though the former decree was signed, inrolled, exemplified, and the conveyance to other trustees executed. Dub. Eq. Ca. 7.

[(O) Abuse

**[(O) Abuse of trusts.]**

[An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with them. 3 M. & S. 574.]

**[(P) Notice of trusts by courts of law.]**

[A court of law will take notice of a trust, and consider who is beneficially interested. 1 T. R. 619.]

Vide more concerning Uses in Chancery, (2 N 1, &c.)—Remitter, (C 6.)

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**USURPATION.**

*Usurpation of a church.* Vide *ESGLISE*, (H 14, 15.)

—— *by the pope.* Vide *POPERY*, (A 1, &c.—B 1, &c.)

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**USURY.**

(A) *Usury, what shall be.* p. 607.

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[(C a.) *Relative to contracts abroad.*] p. 615.

[(C b.) *Its effect on existing demands.*] p. 615.

[(C c.) *Relief.*] p. 615.

(C d.) *Punishment of usury.* p. 615.

(D) *Punishment of brokerage.* p. 616.

**(A) Usury, what shall be.**

Usury was an offence by the common law, and upon conviction the usurer forfeited his goods to the king, and his lands to the lord of the fee. 2 Rol. 800. 3 Inst. 151, 152.

If it was such usury as the Jews took, viz. 40*l.* per cent. per ann.

By st. 37 H. 8. 9. (by which all former statutes against usury are repealed) no person by way of corrupt bargain, loan, &c. or other mean, shall take for forbearance of 100*l.* or other thing due for wares, &c. for one whole year above 10*l.* per cent., and so *pro rata*, &c.

And no person, who takes a mortgage of any lands, &c. on condition, for payment of money, &c. shall have or take in lucre, or out of the profits of such lands, above 10*l.* per cent. for a year, and so after that rate, &c.

By the st. 13 El. 8. (by which 5 & 6 Edw. 20. for repeal of the st. 37 H. 8. 9. was repealed, and the same st. 37 H. 8. 9. was revived) all bonds,

bonds, contracts, and assurances for payment of money upon usury contrary to the said st. 37 H. 8. 9. shall be void.

And the said statute now revived shall be construed most strongly for the suppressing of usury.

By the st. 21 J. 17. no person shall take above 8*l.* per cent. and so *pro rata*, &c.

And by the st. 12 Car. 2. 13. no person upon any contract shall take directly or indirectly for loan of any money or wares, &c. above the value of 6*l.* for forbearance of 100*l.* for a year, and so after that rate, &c.; nor, by the st. 12 Ann. 16. above the value of 5*l.*, &c.

And by the st. 21 Ja. 17. & 12 Car. 2. 13. all bonds, contracts, and assurances, whereby shall be taken above such rate, shall be void. So, by the st. 12 Ann. 16.

And therefore, where a man gives a bond or other assurance for payment of an interest for money above the rate allowed by the statute, it will be void.

Or, if the loan was of goods, or any other thing, and not money. Mo. 398.

So, if upon an usurious contract, he gives a mortgage for security of the principal only, and takes a bond for the interest, the mortgage as well as the bond shall be void. R. 2 Cro. 508.

So, if the allowance beyond the rate of the statute, be by a mean, and indirectly; as, if a man contracts to have 6*l.* per cent.. and deducts the whole at first before the creditor has the money. D. 2 Cro. 26. Mo. 644.

[A. indorses a note for 200*l.*, B. takes the note on advancing 197*l.* three months before due, and at the end of the three months takes another note for 200*l.* on advancing 3*l.* for other three months; this is usury within st. 12 Ann. c. 16. Str. 1243.]

So, if it be upon a contingency whether he shall have above the allowance, or no interest, when there is not any hazard of the principal; as, an agreement for payment of 100*l.* for wares within a month, or otherwise 120*l.* at the end of a year. R. Mo. 397. 5 Co. 70. a. 2 Cro. 508.

[If A. upon a loan of money, stipulate to have half the profits on a resale of goods to be purchased by the borrower, which profits exceed 5*l.* per cent. and A.'s principal is not risked, Qu. whether this contract be not usurious? Cowp. 793.]

Or, for payment of the principal, and 10*l.* per centum so long as A. shall live. R. Mo. 398. R. 2 Cro. 508.

Or, for payment of 20*l.* and to pay 10*l.* for interest at the end of the year, if A. be then alive. R. Cro. El. 642. Mo. 398. 5 Co. 69. b.

Or, to pay 300*l.* for 100*l.* if any of his children be alive two or three years after, when he has many children then alive. Cro. El. 741. R. 2 Cro. 253. 507.

So, though there be a small risk of the principal; as, if the agreement be for 100*l.* to pay 400*l.* at the end of ten years, if any of his five daughters are then living. Dub. Cro. El. 741.

Or, upon a loan of 300*l.* to pay 22*l.* in three months, and 300*l.* with 6*d.* per pound premium within six months, if A. is then living, who was then of the age of 38 years, and in health. R. Carth. 68. R. 2 Rol. 47.

Or, to pay 3s. per month for 7l. after one month, if it be not then paid. *Semb. Jon. 410.*

So, where words are colourably added to avoid the statute, which may be averted; as, if the agreement be to pay for 100l. 20l. per ann. from Michaelmas next, if it be not repaid before Michaelmas, where it was agreed that it should not be repaid before. *5 Co. 69. b.*

For, if the substance of a contract be a borrowing and lending, a slight colourable contingency only will not take it out of the statute. *Cowp. 770.]*

[There is no contrivance whatever by which a man may cover usury, by *Ld. Mansfield, Ch. J. Cowp. 796.]*

Or, if for 100l. he grants an annuity, with an intent to elude the statute. *Per Ch. Bar. Cro. El. 28. R. 2 Lev. 8.*

If upon an usurious contract several securities are given, one for interest, and another for principal. *2 Cro. 508.*

If a feme covert acts as a pawnbroker, and lends money upon an usurious contract, and takes a bond for it to her husband, the bond shall be avoided by pleading the statute, though the husband is not chargeable for the usury *criminaliter.* *R. Skin. 348.*

[If there be an agreement to pay legal interest, and a premium be paid down, over and above the interest, the agreement is usurious and void. *Doug. 235.]*

[But the penalty under the statute of *Ann.* is not immediately incurred, if the premium itself do not exceed legal interest, nor until more than legal interest be actually received. *Ibid.]*

[And therefore, an action may be brought for the penalty, though more than a year has elapsed since the payment of the premium, if it be not a year since what has been paid exceeded legal interest. *Ibid.]*

[If, on a negotiation, for a loan of money, the lender say, he cannot advance the money, but will furnish goods, which the other takes and sells, if the security given be for a sum of money made payable at a future day, greatly exceeding the value of the goods and 5l. per cent. interest, this is an usurious loan, and the security and contract are both void. *Doug. 736.]*

[If an agreement be not usurious when concluded, no after-event can make it so. *3 T. R. 539.]*

[Where the object of a contract is borrowing and lending of money, at more than the legal interest, no shift, colour, or contrivance will take the agreement out of the statute. But if the substance be a sale, or other fair transaction, and the party buying may pay whenever he pleases, at a fair price, and has credit given him in the course of trade; but if he does not pay within the time, then he is to pay an advanced sum of so much per cent. This will not be usury, because it is contingent, and in the nature of a penalty for the delay, and a compensation for the risk. *Lofft. 595.]*

[Whether an allowance of commission, accompanying a loan of interest, exceeds a fair and reasonable compensation for the trouble of the lender, under the circumstances in question, is for the jury to determine; and, if their determination be not manifestly erroneous, the court, though they may doubt its propriety, will not set it aside and grant a new trial. *4 M. & S. 192.]*

[An agreement on discounting a bill, that another bill not due should

be taken in part payment as cash, is usurious, though the full discount was taken. 1 East, 92.]

[The grantor of an annuity having agreed with the grantee to redeem, drew a bill for 5,000*l.* at three years, which the grantee discounted thus:—he took 4,083*l.* 6*s.* 8*d.* as the amount of the purchase-money and arrears, advanced 166*l.* 13*s.* 4*d.* in cash, and took 750*l.* as interest for three years upon 5,000*l.* Held usurious. 3 B. & P. 154.]

[In every case where an allowance of commission accompanies a loan of money, so much of it as may fairly be considered a compensation for the lender's trouble about the business in question, must be considered as commission; but the excess beyond that must be considered as interest upon the loan; so that if, with this addition, the total interest exceeds the legal rate, the loan is usurious. The motive to give the excess beyond a reasonable commission, could not be to compensate the lender for his services; the only motive therefore, was, to induce him to lend the money. 4 M. & S. 192.]

[There is reserved on a loan of money, besides interest at five per cent., a proportion of the expected profits of a trade, but in the losses of which the lender is not to bear a part. Held, that the loan was usurious. 4 T. R. 353.]

[Where a person having discounted a bill for the drawer at five per cent. discount, took an additional sum for guaranteeing the payment of the bill by the acceptor, there being no doubt of the acceptor's solvency; the jury found that this was a cover for usury. 1 Taunt. 511.]

[By st. 14 G. 3. c. 79. the lawful interest in Ireland, or the colonies, may be taken for money lent in England on mortgages of land or goods in these countries, and the deeds executed in England are good. The deeds must be registered according to the laws of these countries.]

[But the interest is not to exceed 6*l.* per cent. s. 2.]

[This statute relates solely to securities on land in Ireland and the colonies: and therefore, where A. contracted with B. for the sale of an estate in the West Indies, and it was agreed that part of the purchase-money should remain secured by the bond of B. and C., and that bond was afterwards cancelled, and another executed in England by B. and D., reserving 6*l.* per cent. interest, in the same manner as the former one, such contract was held usurious. 3 T. R. 425.]

### (B) What not.

But a loan of 100*l.* upon a contract to pay the interest by half-yearly payments, viz. a moiety at Michaelmas and the other moiety at Lady-day, is not usurious, though the advantage of the interest before the end of the year makes it above the rate allowed by the statute; for it is according to such rate, and this is *pro rata* of the statute. R. per three J. two cont. 2 Cro. 26. Yel. 30. Mo. 644. R. Cro. Car. 283. Jon. 396.

[Where it is in the power of the borrower of money to pay the principal within a limited time, without interest; on non-payment, the reservation of a larger sum than the statute allows is no usury. Cowp. 115.]

[Therefore, if a tradesman sell goods at three months' credit, and stipulate, in case the money be unpaid, that the vendee shall allow him

him a halfpenny an ounce per month till he discharge the debt; this allowance, though above the legal rate of interest, yet being the usage in that trade, and the contract being a *bonâ fide* sale, is not usurious. *Ibid.* 112.]

[The loan of money produced by the sale of stock, on an agreement that the borrower shall replace his stock on a certain day, or repay the money on a subsequent day, with such interest in the meantime as the stock itself would have produced, is not usurious, though the interest exceed 5*l.* per cent., unless the transaction be colourable, and a mere device to obtain more than legal interest. 3 T. R. 531.]

[But if the contract were legal at the time it was entered into, no subsequent event can make it usurious, by Buller, J. *Ibid.* 539.]

So, if the contract be for 100*l.* and the interest per ann., and he accepts the whole interest within the year. R. 1 Bul. 17. *Semb. cont.* where the whole was deducted at the time of the loan. Mo. 644. 2 Cro. 26.

So, if by mistake the words require payment before the time agreed, it will be no usurious contract, though the interest exceed the statute, if payable at the time limited; as, if a bond 1 April be to pay 105*l.* on 21 April next, where the agreement was for a year next. R. 2 Cro. 677. R. 2 Vent. 83.

If, in a mortgage, the clause for the mortgagor to take the profits till default be omitted. 2 Mod. 307.

Though the plaintiff had notice of the mistake before action brought. 2 Vent. 83.

So, if the bond was intended to be payable at the end of the year and by mistake it is made payable at six months. R. Cro. Car. 501, Jon. 396.

So, if there be a corrupt agreement, to which the plaintiff was not privy, it shall be no prejudice to him; as, if A. be indebted to B. in 100*l.*, for which A. and C. give a bond to B., and it is agreed between A. and C. that A. shall give 30*l.* to C. for forbearance of 100*l.* which A. owes to C., and shall be bound to C. for this 30*l.*, and A. and C. are bound to B. for the 100*l.*, the bond to B. being for a just debt, though made upon an usurious contract, to which B. was not privy, it shall not be avoided. R. per three J. 2 Cro. 33. *Yel.* 47. Mo. 752. *Acc. per Holt*, T. 8 W. 3. [Com. 4. See Str. 1155. Doug. 736.]

[A bill of exchange given on an usurious consideration is void even in the hands of an innocent indorsee for a valuable consideration, without notice of the usury. Doug. 736.]

And it is sufficient that B. replies that he was not privy, without traversing the corrupt agreement. R. 2 Cro. 33.

[A memorandum indorsed on a bond which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each and interest at 5*l.* per cent. "that at the end of each year the year's interest due was to be added to the principal, and then the 20*l.* received in the course of the year was to be deducted, and the balance to remain as principal, and so continue yearly till both principal and interest were fully paid," was not usurious. 4 T. R. 613. *Kenyon C. J. dis.* 2 H. Bl. 144.]

[The offence of usury is not complete until the lender has actually received the excess of interest in money, or money's worth. Therefore if a promissory note be given for repayment of a sum lent with usurious

interest, and the note when due not paid, but another note substituted for it, the offence of usury is not thereby committed, nor is the penalty incurred till the latter note be paid. 7 T. R. 184.]

[A. being a banker in the country, discounts bills at four months for B., and takes the whole interest for the time they have to run; B., on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills on London, some at three, some at seven, and some at thirty days' sight; and holds not to be an usurious transaction, so as to induce the court to grant a new trial, since the surplus of interest taken by A. might be referable to the expences of remittance. 1 Bos. & Pull. Rep. 144. Supra (A).]

[Where the acceptor of a bill took a premium of sixpence in the pound from the indorsee for payment of the bill a fortnight before it became due, held no usury. 4 East, 55.]

[Where the discount of a bill, instead of money, gives the holder other bills which have time to run, and makes no rebate for this, he not necessarily guilty of usury. 1 B. & P. 144.]

[It is not usurious in a country banker to take, on discounting a bill, over and above 5*l.* per cent. for the time the bill has to run, a farther sum of 5*s.* on the gross sum for commission, if warranted by usage. 2 T. R. 52.]

[Where an agent advances money for his principal, he may lawfully take an extra sum or allowance for his trouble and attention, in addition to the legal interest on the money advanced. What this sum shall be must be altogether a question for the jury, depending upon the peculiar circumstances of the case, the degree of trouble incurred, and the particular custom of trade. And, unless the jury find that the commission was a cover for usury, the court cannot intend that it is so, if it appear that there really was any substantive trouble upon which a compensation might be claimed. 1 M. & S. 56. 192.]

[Where the principal is in hazard, as in bottomry bonds, a reservation of more than 5*l.* interest is legal; secus, where the principal is secured at all events. 4 T. R. 356.]

[The purchase of an annuity for the life of the vendor (thirty-two years of age) at six years purchase, is not usurious, notwithstanding it is made redeemable, at the option of the vendor, at the end of five years and a half purchase, and by mistake of the scrivener, is styled a loan in the recital of the deeds. 2 Blk. 859. 3 Wils. 390.]

[An indorsement on a bond conditioned for payment of 100*l.* by quarterly payments of 5*l.* each, and interest at five per cent., that at the end of each year the year's interest due is to be added to the principal, and then the 20*l.* received during the year is to be deducted, and the balance remain as principal, does not make the transaction usurious, since the year's interest due, must be taken to mean legally due. Lord Kenyon C. J. dis. 4 T. R. 613. 5 T. R. 367. 2 H. B. 144.]

[The defendant was indebted to the plaintiff in 486*l.* 4*s.* 6*d.*, for which the plaintiff had sued him; but being unable to pay it, he agreed, that in consideration that the plaintiff would forbear his action till the 19 Nov. 1804, upon the defendant's giving him a bond to transfer to him, on the 19 Nov. 1804, so much stock as said sum would purchase at the then present day's price, which would amount to 908*l.* 16*s.* 7*d.*

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together with such interest as the same would have produced as such stock" in the meantime. Held not usurious. 8 East, 304.]

[Where the plaintiffs had made advances to the defendant, and credited him with 25,000*l.* at a time when the 3 per cents. were at 50; in consideration of which, afterwards, in October, when the 3 per cents. were 51½, he undertook to purchase the sum of 50,000*l.* in their names, and to account for the dividend therein from Midsummer-day then last; held not usurious. 11 East, 612.]

[An extorting *post obit*, however gross, cannot be considered as usury. 1 Anst. 7.]

[A custom in Liverpool for the banker to strike a balance every quarter, and send the account to the merchant, and then to make that balance a principal to carry interest to the next quarter, is not usury. 2 Anst. 495.]

[An agreement to pay 12*l.* per cent. on the amount of the purchase-money, is not usurious, though there be a covenant to keep the vessel insured, and that the plaintiff shall be entitled to his share of the money, to be recovered from the underwriters. Forrest. 4.]

So, if after a bond upon an usurious contract, A. gives a counter-bond to indemnify the obligor from such bond, and he is thereby damaged, the counter-bond is in force, though the first bond was usurious. R. Cro. El. 642. Noy. 73. R. Cro. El. 588. for the surety perhaps was not privy to the usury.

So, if after a contract made *bonâ fide*, there is a subsequent agreement for a rate above the statute for further forbearance, the last contract only will be void, and not the first. R. Cro. El. 20. R. 1 Sand. 294. Acc. 2 Mod. 307.

So, if a bond or recognizance be forfeited, and it is afterwards agreed to accept more interest than the statute allows, and to make another defeazance, it is no usury; for the forfeiture of the recognizance, &c. is to be considered. R. Noy, 2.

[If one bond be given in lieu of another void from usury, the second bond is also void. 3 T. R. 531.]

[If money is lent at usurious interest, a subsequent contract that all usurious interest should be struck off, and the principal repaid with legal interest, is valid. 2 Taunt. 184.]

[A fresh security given for the balance of a debt originally usurious, is so likewise. Forrest. 72.]

[Where A., for an usurious consideration, had given his promissory note to B. who transferred it to C. for a valuable consideration, without any notice of the usury, and A. afterwards gave his bond to C. for the amount of the note. Held, that this bond was not vitiated by the original usury to which C. was no party. 8 T. R. 390.]

[Where a person, in order to get his acceptances negotiated, agrees with a broker to allow him to retain exorbitant brokerage out of the money received upon getting them discounted, the broker himself not being the party to discount them, a bill accepted and negotiated upon such an agreement is not therefore void. 11 East, 43.]

[A. being indebted to B. for different usurious loans, applies to B. for a further advance, which B. agrees to make at the legal rate of interest, provided A.'s father will give his security for it, and also for part of the previous debt. A.'s father consents, and accepts three bills,

the two first of which exactly cover the amount of the legal debt. The first is paid when due. In an action on the second, held that the acceptances having been given partly as a security for an illegal debt, were all tainted with the illegality, and were therefore void. 1 Mars. 349. 5 Taunt. 780.]

So, if there be a hazard of the principal, it will not be usury, though the interest upon a contingency may exceed 6*l.* per cent.; as, if a wager beto give 40*l.* for 20*l.* paid, if A. is alive at the year's end. Cro. El. 643.

So, if there be an agreement for 100*l.* to pay 80*l.* to each daughter (and he has then five) who shall be living at the end of ten years. R. Cro. El. 741.

[So, on a bond given in the East Indies, where both parties then resided, and where the allowed interest was 9*l.* per cent., the court of B. R. in England (where the bond was sued) held that the plaintiff was in justice entitled to recover the sum really lent, together with Indian interest till the signing of the judgment, but with only the legal interest of this country, from the time of the liquidation of the debt by the judgment. 2 Burr. 1094. 1 Bl. 267. S. C.]

[So, if for two guineas received, a man promises to pay twenty on his wife's death, who is seventy years of age. 2 B. M. 704.]

Or, for 50*l.* to pay 60*l.* at the return of a ship, (which may return in five months,) or if it never returns, nothing. R. 2 Cro. 209. 508. Acc. Sho. 8.

Or, at the return of a ship, goods, or owner; for it is a bottomry contract. R. 1 Lev. 54. R. Hard. 518. Acc. 2 Rol. 48.

Or, for 100*l.* to pay an annuity of 50*l.* a year for life, though there is a mortgage for repayment of the 100*l.* if the annuity is not paid; for it is a purchase, and, upon the death of *cestui que vie*, the money is lost. R. 2 Cro. 252. 1 Bul. 36. R. Cro. El. 27. Per Twisd. 1 Sid. 182.

[If 2000*l.* is lent, on condition to pay the principal and 200*l.* in a year, or 250*l.* per annum for the life of the borrower, it is not an usurious contract. 1 Ves. 164.]

[So, if A. for 120*l.* grants an annuity of 20*l.* out of a living, by deed, with promise for redemption in five years, and gives bond for performance, this is not usury, though the words borrow and lend are used. 13 Wils. 390. 2 Bl. 859.]

Or, for 100*l.* to pay 20*l.* a year from Michaelmas next, if the 100*l.* is not repaid before Michaelmas; for he may repay it before Michaelmas without interest, if this was the true intent. 5 Co. 69. b.

Or, if for 300*l.* a lease is made to B. at 35*l.* per ann. of a house of which the rent was only 5*l.* with a covenant to convey to him, if B. repaid the 300*l.* in four years; for it was at the election of B. to repay or not. R. 2 Lev. 7.

[So, if A. lends B. 100*l.* for four years, without interest, in consideration that B. shall provide meat and drink for A.'s daughter C. who is to be partner with B.'s wife, have half the profits, and bear half the loss, and to lodge A. for 10*l.* per ann., it is not usurious, though the board of C. and lodging of A. might be worth 30*l.* per annum. 2 B. M. 891.]

[Mortgages, &c. executed in Great Britain, affecting lands in Ireland, &c. may bear 6 per cent. interest]

[By

[By stat. 17 G. 3. c. 26. a memorial of all deeds, &c. for grant of annuity for life, shall in twenty days be inrolled in chancery, or shall be void; so, of judgment on warrants of attorney for that purpose. Deeds must contain the consideration.]

[(C a.) Relative to contracts abroad.]

[The stat. 14 Geo. 3. c. 79. which enacts that mortgages and other securities respecting lands in Ireland and the West Indies, reserving interest allowed in those countries, shall be valid, though executed in England, does not extend to personal contracts. 3 T. R. 425.]

[(C b.) Its effect on existing demands.]

[A prior legal debt is not destroyed by a subsequent usurious contract relating to it. 1 H. Bl. 462.]

[(C c.) Relief.]

[The rule that where parties are in *pari delicto potior est conditio possidentis*, applies to the lender, though not to the borrower under a usurious contract. The borrower therefore may have relief from the contract by action or motion, as the case may require; but since this is upon equitable grounds, the maxim that a party who seeks equity must do equity applies; therefore, before suing, he must place the defendant in his original situation, as by tendering back to him the money really advanced, with legal interest. 1 T. R. 153. Id. 225. 1 Taunt. 413.]

(C d.) Punishment of usury.

By the st. 13 El. 8. 21 Jac. 17., and 12 Car. 2. 13. all bonds, contracts, &c. upon usury are void. Vide ante, (A).

How the statute shall be pleaded to such a bond, &c. vide in Pleader, (2 W 23.)

By the st. 13 El. 8. persons taking usury above the rate mentioned in that statute shall forfeit such interest, &c.

By the st. 37 H. 8, 9. and 12 Car. 2. 13. if any, by way of corrupt bargain, &c. take more than is allowed by statute for forbearance of money or other thing, he shall forfeit treble the value of the monies, wares, &c. lent, &c.; a moiety to the king, a moiety to him who will sue for the same.

And though the first contract was not usurious, if a man takes afterwards above the allowance of the statute for the loan of money, &c. an information lies upon such statute. 1 Sand. 295. R. 1 Vent. 38. Ray. 196.

And if there be an usurious contract to pay 20*l.* for forbearance of 100*l.*, an information lies, though he does not take above the legal interest. R. 1 Vent. 38. Ray. 126. Per Twisd. 1 Mod. 69.

So, though he takes but a penny of the interest upon such agreement. Cro. El. 20.

So, if a feoffment, lease, &c. be made upon an usurious contract, it will be void, as well as a bond. Jon. 303.

[But an indictment for usury lies not for a corrupt agreement without loan, or taking in pursuance of it. Str. 816.]

So, if an usurious contract be for 20*l.* for forbearance of 100*l.*, and he takes no part of the 20*l.*, an information does not lie against him. R. Cro. El. 20.

[When the usurious contract, the lending, the forbearance, or interest concur, then the offence is committed, and the action must be brought on 12th Ann. within a year from that day, nor does part of the penalty being to the king avail. 3 Wils. 250. 2 Bl. 792. S. C.]

[Where A. lent B. 500*l.* paying immediately a premium of 50*l.* and paying interest on the 500*l.* at 5*l.* per cent. for five years, at the end of which time, a *qui tam* action was brought; held that it was in time. 2 B. & P. 381.]

[Where A. had borrowed 600*l.* of B., paying him ten guineas premium; and at the end of the half year A. paid 15*l.* for interest; held that the usury was complete. 1 East, 195.]

[The court will permit prosecutor to compound. Barnes, 118.]

[The usurious contract must be proved as laid. Cowp. 671.]

[Before a party can entitle himself to relief, by civil action, from an usurious contract, he must tender all the money really advanced; therefore, where goods are pawned to a broker for a certain sum, and usurious interest agreed to be paid thereon, the pawner of the goods cannot maintain an action of trover for them, in order to get rid of the usurious contract, without first tendering the money which had been actually advanced, with legal interest. 1 T. R. 153.]

[A *bona fide* debt is not destroyed by being mingled with an usurious contract relating to it. 1 H. Bl. 462.]

[The court will stay proceedings on a *scire facias*, in a judgment entered up on a warrant of attorney, to wait the event of an issue directed to try the usury. Cowp. 727.]

### (D) Punishment of brokage.

So, by the st. 12 Car. 2. 13. scrivener, broker, solicitor, &c. who shall directly or indirectly take any money or other reward, above the value of 5*s.* for procuring the loan or forbearance of 100*l.* for a year, and so *pro rata*, &c. or above 12*d.* for making or renewing a bond or bill for such loan, or for a counter-bond concerning the same, shall forfeit 20*l.* for every offence, and be imprisoned for half a year; a moiety to the king, a moiety to him who will sue for the same.

But an agreement by A. to give B. 200*l.* if he procures 5000*l.* to be paid in his name upon an aid granted by parliament, does not appear to be brokage; for the borrower pays nothing, and the lender receives nothing. R. Skin. 322.

[See also stat. 17 Geo. 3. c. 26. s. 17.

Vide more concerning Usury, in Pleader, (2 G 7.)

## UTLAGARY.

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## (A) Outlawry.

A man outlawed is, when by judgment of law a man, by his own default, is ousted of the law. Co. L. 122. b. 128. b.

For every man at his age of twelve years ought to be sworn to the law in a tourn or leet, and by his outlawry he is *positus extra legem*. Co. L. 122. b.

A woman who does not swear to the law, by judgment of outlawry, is not said to be outlawed, but *waiviata*. Co. L. 122. b.

And therefore, if a woman is said to be *ullagata*, it will be error. R. 2 Rol. 804. l. 5.

## (B a.) In what cases it lies.

A man shall be outlawed for his default if he will not stand to the law; and therefore, upon an indictment for treason or felony, if the defendant does not appear upon the second *capias*, he shall be outlawed. Vide Indictment, (I).

So, in an appeal. St. P. C. 60. a. 67. Vide Appeal, (G 5.)

And if he does not render himself within a year, he shall be executed without other judgment or trial. 3 Mod. 42. 72.

[It

[It lies on an information. 4 B. M. 2527.]

[And in an information for any offence, in its nature against the laws of society, and that disturbs the good order which keeps a state in peace, (the true meaning of *contra pacem*,) though not with actual force. Ibid.]

So, upon an indictment for a misdemeanor or information, he shall be outlawed, but he shall not be fined thereon without other conviction for the offence. Vide Information, (D 1.)

So, if a peer does not appear upon an indictment for treason or felony, he shall be outlawed. 3 Inst. 31.

But where a *capias* does not lie in process, the defendant cannot be outlawed before or after judgment; as, upon a writ of privilege by an attorney or another. R. 1 Leo. 329.

[It lies not for less than 10*l*. Semb. sed qu. Barnes, 320.]

If defendant avoids arrest, though he appears publicly, he may be outlawed. Barnes, 320.]

[On total absconding, no endeavours to arrest are necessary. Barnes, 322.]

How to proceed to outlawry, vide in Pleader, (2 W 4, &c.)

### [(B b.) Outlawry of a co-contractor.]

[Notwithstanding the outlawry of one of two contractors sued jointly, the action remains joint, so that the other may insist on any defence which he might have made, had the outlaw defended. 4 T. R. 611.]

### [(B c.) Of a co-defendant.]

[A declaration in a joint action against two, of whom one has been outlawed, will be set aside, unless the process issued against each be referable to and connected with the same original. 15 East, 1.]

[The rule, that if a man be outlawed at the suit of another, all men shall have advantage of this personal disability, only applies to the case where he is plaintiff; a declaration, therefore, against one sued with another, who has been outlawed, stating that fact, but not adding that the outlawry was in this suit, is insufficient. 3 East, 144.]

[In declaring against one defendant upon a contract jointly with another defendant who is outlawed, it is not necessary to aver the outlawry with a *prout patet per recordum*, if it appear to be in the same suit. 3 Smith, 56. 7 East, 50.]

[Where after outlawry of one of two joint defendants, and before final judgment, the other dies, the right survives against the outlaw, and against him alone. 1 M. & S. 242.]

### [(B d.) Of an accessory.]

[Thest. of Westm. c. 14. (3 Edw. 1. c. 14.) enacts, that no accessory shall be outlawed until he that is appealed (which is held to mean indicted as well) of the deed be attainted; and his exigent shall remain until the principal is attainted by outlawry or otherwise. Since an indictment against several is in law a separate indictment against each (unless where  
it

It was essential that they should have joined to make the offence,) an outlawry of the principal and accessory (indicted together) on an exigent against both, is erroneous as to the accessory alone. 4 T. R. 521.]

**[(B e.) Of a party abroad.]**

[It is sufficient to reverse an outlawry, that the party was abroad at the time of exigent proclaimed. 12 East, 624.]

[If outlawry be obtained while the defendant is beyond sea, it is error, though he went abroad to avoid process. 4 Taunt. 691.]

**(C) How an outlawry shall be avoided.**

**(C 1.) For what causes.**

Outlawry shall be avoided if the person outlawed, at the time outlawry pronounced, was within the age of discretion; as, if he was an infant under fourteen years. 2 Rol. 805. l. 10. R. Dy. 239. a. Bend. pl. 205.

So, if a woman, at the time she is waived, was covert baron. 2 Rol. 806. l. 45.

So, if a man, at the time of his outlawry, was in prison, it will be error. Lit. s. 437. 2 Rol. 803. l. 35.

Though the outlawry was for felony, or in a personal action. 2 Rol. 803. l. 35.

But imprisonment is no cause to avoid an outlawry, if it be by covin or consent. Co. L. 259. b.

If a man in prison, brought to the bar, will not appear. R. 2 Rol. 804. l. 50.

So, if a man, at the time of his outlawry, was out of the realm, it will be error. Skin. 6. [2 Str. 1178. 1 Wils. 3.]

If a man was in the king's service with a captain, &c. in war. 2 Rol. 803. l. 42. 804. l. 15.

Or, about the king's business, by his command under letters patent, 2 Rol. 803. l. 40. 804. l. 15.

So, if he was out of the realm for his own private business, or for his pleasure, and not upon the business of the king, or the realm. 2 Rol. 804. l. 20. 2 Rol. 11, 12.

Though he be outlawed for felony, or in a personal action. 2 Rol. 804. l. 35. Skin. 16.

So, if he goes out of the kingdom upon the business of the king or the realm, after exigent pronounced, he shall avoid the outlawry afterwards. R. 2 Rol. 804. l. 40.

But if a man goes voluntarily out of the kingdom after exigent for felony pronounced, he shall not avoid the outlawry afterwards pronounced. R. 2 Rol. 804. l. 30.

If it appears upon the record, or confession of the king's attorney. Semb. 2 Rol. 12.

So, outlawry for treason cannot be avoided, because the party was out of the realm; for by the st. 26 H. 8. 13. and 5 & 6 Ed. 6. 11. process and outlawry against any for treason, who is out of the realm, shall be as good as if then resident in the realm. 3 Inst. 32.

So, an outlawry may be avoided, if the person [outlawed be misnamed,

named, or his addition mistaken; as, if he be named knight, when he was a baronet. R. Comb. 184.

[If the day and year of the king be inserted in the 1st, 2d, 3d, and 5th exaction, but omitted in the 4th, it is erroneous, and shall not be supplied by intendment. 2 Hale's P. C. 203.]

[The sheriff must state, in his return to the writ of exigent, the day and year of each exaction. Therefore, where the sheriff stated that on such a day in the 30th year of the reign he exacted the defendant a third time; that afterwards, on such a day, (omitting the year,) he exacted him a fourth time; and that afterwards on such a day in the 30th year aforesaid he exacted him a fifth time, it was holden insufficient, and a good ground for reversing the outlawry. 5 T. R. 202. 2 Rol. Abr. 202. pl. 8.]

[In a record of outlawry it appeared by the writ of proclamation and return to it that the prisoners were required to render themselves to the sheriff, so that he might have their bodies before the justices, &c. at the return of the writ, and it was holden good. 4 T. R. 521.]

[If it appear on the record that the writ of proclamation was delivered to the sheriff, three months before the return of it, it is sufficient, though it be not so expressly alleged. Ibid.]

[The writ of proclamation required the sheriff to proclaim the parties in open court in the sheriff's county (not saying county court), and it was holden good. 4 T. R. 521.]

[The sheriff need not allege in his return to the writ of proclamation that "the persons proclaimed did not appear, and render themselves," though he must in his return to the exigent. Ibid.]

[The names of the coroners need not be subscribed to the judgment of outlawry; it is sufficient, if it appear on the record that the judgment of outlawry was given by them. Ibid.]

[It need not appear on a record of outlawry that the *capias* and exigent were sealed by the justices of oyer and terminer, &c. Ibid.]

[If it be stated that the justices of our lord the king were assigned by letters patent under his seal of Great Britain, it will be presumed to be the great seal. Ibid.]

[It need not be stated in express terms on a record of a judgment of outlawry that a writ of *capias* issued against the defendant; it is sufficient if it appear "that the sheriff was commanded to take the defendant," &c. 6 T. R. 573.]

[Neither is it necessary in stating every writ to repeat the day and year when each was issued; it will suffice if it appear by referring to the preceding parts of the record; as if, after stating that the *capias* was returned on such a day, it proceed thus: whereupon the exigent was awarded; whereupon referring to the day when the *capias* was returned. Ibid. Vide supra Pleader, (2 W 5.)]

If he be outlawed by judgment of the coroners, without naming them, except in London, where the mayor is coroner, and therefore *ideo utlagat. est* is sufficient without more. R. 2 Cro. 528. 531.

[So, an outlawry for felony shall be reversed, if it appear on the writ of proclamation, and the return to it, that the person indicted was outlawed after a day had been given him in court, and before such day arrived. 3 T. R. 499.]

So, by the st. 5 & 6 Ed. 6. 11. if any outlawed for high treason, within one

one year after yield himself to the chief justice, and offer to traverse the indictment on which he was outlawed, he shall be admitted so to do, and, being acquitted of the indictment, shall be discharged of the outlawry.

So, by consent of the attorney-general, he may reverse the outlawry or error. 3 Mod. 42.

And shall assign error at the bar, in proper person *ore tenus*, and then the court assigns counsel to argue it. Skin. 16.

But the st. 6 Ed. 6. does not extend where the outlaw is apprehended, and does not render himself. R. 3 Mod. 47.

[A person committed for high treason, in diminishing the coin, who makes his escape before indictment, and is then indicted and outlawed, and then retaken within the year, may have *habeas corpus* to B. R. and surrender; then have *certiorari* to remove the proceedings, plead his having been beyond sea, and have the outlawry reversed. Str. 824.]

So, an outlawry for high treason shall not be reversed, because process was awarded against him when out of the realm; for by the st. 26 H. 8. 13. and 5 Ed. 6. 11. such process is good. 3 Inst. 32. 216. Dy. 287. a.

[When there has been misbehaviour in plaintiff, the court will oblige him to reverse an outlawry at his own costs; but if it is a mistake or error in law, it must be by writ of error. B. R. H. 123.]

[Outlawry shall not be set aside for irregularity, on motion, because it is on debt by original in B. R. B. R. H. 317.]

[If, in debt on bond by wife *dum sola*, the husband is gone abroad and outlawed, and the wife, though she appears publicly, is waived, the outlawry against her shall be set aside on motion; but goods taken on *cap. utlagat.* must be deemed the husband's, though sworn to be her separate goods; and if she has equitable right, she must apply in equity. 2 Wils. 127.]

[If defendant was prisoner, pending exigent, outlawry shall be reversed on common appearance. Barnes, 312.]

[Where outlawry is not special, defendants may reverse at their own expence, and payment of costs on common appearance; if before transcribing into the exchequer, common costs to the exigent; if after, costs to the time of reversal. Barnes, 324.]

[If plaintiff dies after judgment, there must be *scire facias*, or outlawry shall be set aside. Barnes, 325.]

[Outlawry, commenced and prosecuted during defendant's residence in Ireland, shall be reversed without bail or appearance. Barnes, 325.]

[Before defendant is returned outlawed, he may supersede exigent on appearance and costs; but after, there must be bail, who are bound to pay the money, without option to render principal. Barnes, 326.]

[The court will stay proceedings on payment of debt and costs in a month. Ibid.]

[If feme-sole is waived specially on mesne process, and after exigent, and before outlawry, married, the court will not interpose. Barnes, 321.]

[Proceedings shall not be staid because plaintiff died before return, if after day of outlawry. Barnes, 323.]

## (C 2.) When avoided.—By plea,

An outlawry may be avoided in two manners, by plea, or by writ of error. Co. L. 259. b.

[But, though illegal and void, it cannot be set aside by a third person in a collateral action. 1 Bl. 20.]

If an outlawry be voidable for matter appearing upon the record, the party in the same term may reverse it by plea. Co. L. 259. b. Bend. pl. 137.

As, for omission of any process. Co. L. 259. b.

Or, variance. Co. L. 259. b.

If outlawry does not lie in such case. Semb. Dy. 223. a.

Or, process was superseded before outlawry pronounced. Dy. 223. a. Bend. pl. 15. R. Mo. 73. 1 And. 36.

If no proclamation where the party was commorant at the time of the exigent. R. Dy. 214. Bend. pl. 155. 1 And. 36.

Or, no addition to the defendant. R. Bend. pl. 212. Mo. 70.

If no return upon process.

Or, the sheriff was removed, and another appointed upon record before the return. R. Dy. 41. b.

So, for any cause, except want of proclamation, the party shall avoid the outlawry upon motion, where he comes in gratis upon the exigent, alias, or pluries. Sal. 496.

So, if he comes in another term. 1 And. 36.

So, *in favorem vite*, outlawry in felony may be reversed by plea, if it be voidable, for death, imprisonment, out of the realm, &c. Co. L. 259. b.

But in B. R. an outlawry shall not be reversed by plea, but by error only, in the same term as well as in another, though it be error appearing upon the record. 1 Rol. 743. l. 10.

If a man comes in upon the return of the *capias utlagatum*, he may plead, in avoidance of the outlawry, a matter which may avoid it by plea. Co. L. 259. b.

And upon the plea, and security given, there shall be restitution of the goods. Hard. 98.

So, if there be matter appearing upon record to avoid the outlawry, the party, who appears as *tertenant*, must demur, upon return of the inquisition taken upon the *capias utlagatum*. Hard. 58, 59.

And several *tertenants* may join in demurrer. Hard. 59.

So, a *tertenant* may plead to the inquisition.

[The prisoner must first plead to the outlawry, and that must be tried before he can plead to the indictment. Str. 824.]

[He may plead *ore tenus*, the attorney-general reply *ore tenus*; the *venire* is awarded returnable *instante*; the jury returned sitting the court; he may have counsel; he has no peremptory challenge. Ibid.]

[The court cannot assign the defendant counsel on an outlawry for treason till he has pleaded, and then he may have counsel on the collateral matter. 1 B. M. 638.]

[The court will allow attorney-general to confess error in fact, though not true, but not error in law, if not true. Ibid.]

[If defendant pleads, not the same person, it is tried *instante*. Ibid.]

[If an exception goes to shew that the outlawry is a nullity, it avoids it without writ of error. Ibid.]

[If error in fact is alleged, the court may give defendant leave to plead to the indictment; if error in law, there must be writ of error. Ibid.]

(C 3.) By motion.

So, a man, *ut amicus curiæ*, may avoid an inquisition upon an outlawry, by matter apparent in it, upon motion. R. Hard. 86.]

[The court of common pleas will reverse an outlawry on motion. 3 Taunt. 141.]

[It is discretionary, when to reverse on motion or not; if defendant hath been long abroad, the court will not reverse at plaintiff's expence. Barnes, 324, 325, 326.]

[The court will not set aside outlawry for want of proclamation on motion. Barnes, 323.]

(C 4.) By error.

But generally, where the outlawry is voidable for matter of fact, if it be not in felony or treason, it must be avoided by writ of error. Co. L. 259. b.

So, an outlawry may be reversed by error, in treason or felony.

[A writ of error on an outlawry (even for felony) is never denied, if the witnesses are living. Fort. 38.]

[The attorney-general will not grant *fiat* for writ of error till defendant is in actual custody on *cap. utlag.* 4 B. M. 2527.]

And in treason there is no need of a *scire facias* to the lords mediate or immediate; for no forfeiture accrues to them. R. 4 Mod. 366.

So, in felony, if it be suggested that he has no lands, and the attorney-general confesses it, there is no need of a *scire facias*. Sal. 495.

Otherwise, where the defendant has lands which for felony are forfeited to the lord of whom held. Ibid.

If two are outlawed in the same action, and only one appears, to reverse it, error shall be in the name of both, till the other appears, and is summoned and severs. R. Sal. 496.

And he was obliged to appear in person, till the st. 4 & 5 W. & M. 18. Vide Attorney, (B 6.)

[A person outlawed for want of appearance to an indictment, for a libel against the government, shall have a writ of error, and be admitted to bail. Fort. 37.]

[No bail is given in error of an outlawry till reversal; and then it is to appear to an original, to be brought in two terms. Str. 951.]

[But on reversal special bail must be given, though there was no affidavit originally of the debt, if the debt was bailable. 2 Str. 1178. 1 Wils. 3.]

If error is brought, and the attorney-general confesses it, it shall be reversed, and the defendant immediately tried upon the indictment. Sal. 495.

If he assigns error for being out of the realm, it is sufficient to say generally, *quod tempore utlagar. fuit.* R. 2 Rol. 12.

Though

Though he goes after the exigent; for, if he was then here it shall be shewn on the other part. R. 2 Rol. 804. l. 45.

[Outlawing a man beyond sea is error, not irregularity. Barnes, 319.]

[If one exigent be awarded against the principal and accessary together, it is error only as to the accessary. 4 T. R. 521.]

[On a writ of error to reverse an outlawry, on the ground that the outlaw, before and at the time of suing out the writ of exigent, and from thence until the time of pronouncing the outlawry, was in parts beyond the seas, the plaintiff in error having proved the previous proceedings in the outlawry, and that the outlaw, at the time of suing out the exigent, was abroad, and died abroad; but without fixing the time of his death. Held, that it was not necessary to prove the time when the judgment was pronounced. 1 Mars. 58. 5 Taunt. 309.]

[When you come to reverse an outlawry, you must have the record in court. Lofft. 348.]

#### (C 5.) Party restored after reversal.

If the outlawry is reversed, the party shall be restored to all he lost.

[After an outlawry has been reversed, the case is the same as if it had never been; insomuch that all proceedings in the interim between outlawry and reversal, upon the same footing as if no outlawry had been pronounced, are valid. 7 T. R. 259.]

If a term be sold by the king, he shall be restored to the term. Per two J. Cro. El. 278. R. 1 And. 277. R. 2 Ver. 315.

If a lease be made by the exchequer to the plaintiff, of the lands of the outlaw, and he levies the profits by exchequer process, which, by order of the court, are delivered to him; yet they shall be restored upon the reversal of the outlawry. 2 Jon. 101.

But, if the king's lessee be outlawed, his term shall not be restored; for it was extinct. R. Mo. 237.

So, he shall have all his lands and tenements.

Though the king has granted them to another and his heirs. 1 And. 188.

And he may enter upon reversal of the outlawry, without petition or *scire facias*. R. 1 And. 188.

So, he shall be restored to a presentation to an advowson.

So, to all his goods and chattels.

To his stock in the East India or any other company, though granted to another by privy seal. 2 Ver. 313. 2 Lev. 49. cont.

So, if the king's grantee acknowledges satisfaction upon a judgment, it shall be set aside in equity, and restitution made. 2 Ver. 313.

So, a lessee of the outlaw shall have trespass for the profits received between the assignment to him and the reversal. R. Cro. El. 270.

But the profits of the lands, received during the outlawry, shall not be restored. 2 Ver. 313.

Nor East India stock, granted to A, by privy seal, and transferred to him by the company, where the restitution was to all, *quod non fuit nobis responsum*. R. 2 Lev. 49.

(D) For-

(D) Forfeiture by outlawry.

(D 1.) In treason or felony.

If a man is outlawed for treason or felony, he forfeits all his lands and tenements, goods and chattels. Vide Forfeiture, (B 1, &c.)

So, money received by his servant, and brought to his house, though not delivered to him. Sav. 40.

(D 2.) In personal actions.—What things are forfeited.

A man outlawed in a personal action forfeits his goods and chattels. 2 Rol. 806. l. 40. 1 Sal. 395.

And his chattels real; as, a term for years, &c. 2 Rol. 806. l. 43.

And the trust of a term. 1 Sal. 109. R. Hob. 214. Hard. 496.

If tenant at will sows his lands, and is outlawed, the king shall have the emblements. 2 Rol. 806. l. 50.

If a church is void, and afterwards the owner is outlawed, it shall be forfeited to the king. 2 Rol. 807. l. 17. Ca. Parl. 75.

So, if the church becomes void after the outlawry, the king shall present. 2 Rol. 807. l. 45.

So, the king shall have all the profits of his freehold lands. 2 Rol. 807. l. 32.

So, if the lessor is outlawed, the king shall have the profits of his tenant at will; for by the outlawry the will is determined. 2 Rol. 807. l. 35.

[The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit. 7 T. R. 259.]

So, if a man be outlawed after a judgment recovered by him, the king shall have the profits of all the defendant's lands, though the plaintiff can have only a moiety in execution. R. 2 Cro. 513.

So, if the king's lessee is outlawed, he forfeits his lease. R. Mo. 237.

So, a man outlawed forfeits stock in the East India company, &c. 2 Lev. 49. 2 Ver. 313.

So, upon a *levari facias*, after an inquisition upon an outlawry, a stranger's cattle, levant and couchant upon his land, may be seized and sold; for they are the issues or profits of the land. R. Skin. 618. Vide post, (D 4.)

So, a bond to A., who was trustee for B., will be forfeited by the outlawry of B. R. 2 Rol. 807. l. 15. 2 Cro. 512, 513.

If a man recovers damages in a personal action, and afterwards is outlawed, the king shall have the damages and execution for them upon the judgment. R. 2 Rol. 807. l. 2.

If the conusee of a statute sues an extent, and has the conusor in execution, and afterwards is outlawed, the debt is forfeited, and the king may discharge the conusor; for his body is not a satisfaction. R. 2 Rol. 807. l. 5.

So, if A. has judgment against B., who holds jointly with C., who aliens, and afterwards A. is outlawed, the king shall have an extent for the moiety of B., though the alienation was before the outlawry. R. Lane, 20.

So, if a statute is acknowledged to two, and one sues execution, and afterwards is outlawed, it will be a forfeiture of the debt against both. R. 2 Rol. 808. l. 30.

So, if a bond be made to two, one of whom is outlawed, the whole bond will be forfeited. Semb. 1 Rol. 7.

(D 3.) What not.

But by outlawry in personal actions a man does not forfeit any lands, of which he has an estate of freehold. 2 Rol. 807. l. 30.

Nor, a rent-charge for life, nor arrears which accrue for the rent during his life. Hut. 54.

[Copyhold lands are not liable to be seized; and if they are, and a *venditioni exponas* issued, it shall be quashed. Park. 190.]

If A. seised in fee leases for years, and is outlawed, the king shall not have the profits during the term. Bro. Patent, 3.

So, he does not forfeit debts due to him upon contract. 2 Rol. 806. l. 52.

Or, other *choses in action*. Semb. Sav. 40.

Nor, the equity of redemption of a term. Semb. 2 Ver. 314.

Nor, money due to him upon mortgage. Hut. 53.

So, he does not forfeit a thing of which the interest was not vested in him; as, if lessee at will sows his land, and the lessor is outlawed, the king shall not have the emblements. 2 Rol. 807. l. 35.

If a feme covert, possessed of a term for years, be waived, the king shall not have the term. 2 Rol. 806. l. 45.

If an executor is outlawed, he does not forfeit the goods which he has of the testator's. 2 Rol. 806. l. 47.

Nor, the goods which he himself recovered as executor. 2 Rol. 806. l. 35.

Nor, the cattle of a stranger, levant and couchant upon his land. R. Skin. 617. cont. Vide ante, (D. 2.)—post, (D 5.)

So, a lease by the king to a man outlawed will be good; for he has a capacity to be a farmer to the king. R. Mo. 237.

(D 4.) To whom the forfeiture shall be.

If a man is outlawed, the forfeiture shall be to the king.

Though he is outlawed in a personal action.

So, if the lessor of lands, within a county palatine, is outlawed, though the count palatine has the goods of the outlaw within his precinct, yet the king shall have the arrears of rent; for it follows the person. Dub. 2 Rol. 808. l. 40. Lane, 90.

Yet the outlawry in a personal action shall be for the benefit of the party, if he pleases; and therefore, if the defendant is taken upon a *capias utlagatum*, after judgment upon prayer he shall be in execution for the party. Ca. Parl. 73. Doug. 547. 4 Burr. 2549. Vide Execution, (B 2.)

So, the king may grant the benefit of an outlawry to another. R. 2 Rol. 188. l. 5.

(D 5.) How advantage shall be taken of it.

So, upon the outlawry, a general *capias* lies against the person outlawed.

Or, a special *capias utlagatum*, by which the sheriff is commanded *quod per sacramentum, &c. inquiret quæ bona aut catalla, terras aut tenementa habuit die utlagar. et ea extendet appreciari fac., &c.* Off. Br. 35.

And thereupon the sheriff returns an inquisition taken by him. Lut. 330.

[If a man is outlawed in a civil action, and extent, inquisition, and *levari facias*, and 50*l.* levied thereon, it may not be paid to plaintiff on motion, though defendant consent, if nobody consents for the crown; for it belongs to the king, if a lease is not taken out. Bunb. 38.]

If the land be under-valued, there may be a *melius inquirendum*. Hard. 106.

And such inquisition must be as certain as an indictment or declaration. Semb. Hard. 58.

And therefore, if it finds several parcels of land, without saying of what nature, it will be bad, though it mentions the value and tenants' names. R. Hard. 59.

But it is sufficient if it shews the value of the lands *in toto*, though it does not shew the value of every particular parcel. R. Hard. 7.

So, if it finds two marshes of such a value in the possession of B., though it does not say how many acres. R. Hard. 59.

Or, a close called D., though it does not mention quantity or quality. Hard. 76.

So, *de 6 clausis terræ et pastur. de messuagio sive tenemento*, &c. are sufficient; for being only an office for information, so much certainty is not necessary as in an office to entitle. R. Hard. 191.

So, the return may be good in part, and quashed for part. R. Hard. 59.

So, if there be a variance in the outlawry returned to the exchequer from the record in C. B. it may be amended. R. Hard. 7.

So, an information lies in the exchequer, in the nature of a trover, against him who has goods of the outlaw, and does not deliver them. R. per Hale, 1 Mod. 90.

So, after the inquisition returned in C. B. a transcript thereof shall be transmitted to the exchequer, and thereupon a *scire facias* goes against him who has goods of the outlaw in his hands. Lut. 331.

So, by bill by the attorney-general in the exchequer, a discovery of his real and personal estate, and the grants made of it, may be required; for the outlawry is in the nature of a judgment for the king. R. upon demurrer, Hard. 22.

So, a common person may demand a discovery against an outlaw by bill, to enable him to take out execution. Hard. 22.

So, where a man is outlawed in a personal action, the king may take the profits of his freehold; as, the rent, corn, grass, &c. 2 Rol. 808. l. 5.

And may grant to another to levy the profits in his name. 2 Rol. 808. l. 22.

So, he may make a lease to the outlawed person himself; for he is capable as a farmer. R. Mo. 237. Vide *infra*.

[On an inquisition on an outlawry, a term for years cannot be sold by the sheriff; for the profits only are forfeited to the king. Semb. Bunb. 104.]

So, the cattle of a stranger, levant and couchant upon the land, shall be taken as the issues of the land. R. 1 Sal. 395. 5 Mod. 117.

So, the cattle of a commoner, or tenant in common, if his title is not found by the inquisition. 1 Sal. 395.

So, it is the usual course of the exchequer, to grant a lease of the lands of the outlaw to the party who sues the outlawry. Ca. Parl. 72: Hard. 106. R. Mo. 237.

[If, defendant being outlawed, plaintiff gets a lease from the crown, and is obstructed, he cannot have an injunction to put him in possession, but he may bring trespass for the profits, or have an ejectment. Sed Qu. de ceo. Bunb. 261.]

[The king, under an outlawry, or his lessee, may redeem a mortgage. Park. 268.]

And the lessee may take the profits to the value extended, but not the other profits, if they are of greater value, before a *modus inquirendum*, which finds the full value. R. Hard. 106.

So, the party at whose suit he was outlawed, may obtain a grant of the lands by privy seal.

If the lands of the outlaw are seised, and the inquisition returned, the outlaw, by his feoffment or sale afterwards, cannot defeat the king, &c. of the profits. R. 1 Lev. 34.

So, they cannot be afterwards extended by *elegit*, upon a judgment before the outlawry. R. Ca. Parl. 75. R. Hard. 106. R. if there be no covin. Sal. 495.

So, the heir or feoffee of the defendant shall be bound by the outlawry. 1 Sal. 395.

But the king has not the possession of freehold land; for he cannot grant or lease generally. 2 Rol. 808. l. 20. 15.

Neither can he plough the land to sow. 2 Rol. 808. l. 7.

Nor, seize the land; for then, upon pardon or reversal of the outlawry, he would be put to sue livery. 2 Rol. 808. l. 12.

Neither can he cut trees or underwood. 2 Rol. 808. l. 10.

And a man outlawed may make a feoffment, whereby the king is deprived of the subsequent profits. 2 Rol. 808. l. 17.

But this is intended of a feoffment before seizure for the king. 1 Lev. 34. 1 Sal. 395.

So, if he levies a fine before seizure, the estate passes. R. 1 Lev. 33. Ray. 17.

Or, makes a bargain and sale. Semb. 1 Lev. 33.

So, before seizure, execution may be upon the land by *elegit*. Semb. 1 Lev. 33. R. Hard. 75.

So, if, before the inquisition returned, he makes a lease *bond fide* for a valuable consideration. R. Hard. 101.

And an assignment by such lessee, after the inquisition returned, will be good. R. Hard. 422.

So, a stranger, having title before seizure, may enter and maintain an ejectment. R. Hard. 176.

So, by a feoffment after seizure, the estate passes to the feoffee, though the king shall have the profits during the outlawry. 1 Sal. 395.

So, the lessee of lands, seized by outlawry, shall account for the profits (which he might have received without his default) to another creditor of the outlaw, who has an interest in the land. Hard. 106.

Personal chattels are forfeited and vested in the king by the outlawry before inquisition found. R. 1 Sal. 395. Vide Forfeiture, (B 4. 6.)

But

But chattels real, and the profits of land, are not forfeited, till inquisition found. 1 Sal. 395.

[Where there are two outlawries at different times, the first inquisition shall prevail. M. 36 C. 2.]

[Where there are two outlawries on one day, the first inquisition shall be preferred. P. 21 C. 2.]

[Where there are two inquisitions on one day, the first outlawry shall be preferred.]

[Where there are two outlawries on one day, and both inquisitions on one day, the first lease shall be preferred. M. 22 Geo. 2. Park. 85.]

*Actagatum capias.* Vide PLEADER, (2 W 6.)

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## WAGER OF LAW.

Vide PLEADER, (4 W 45.—2 X 4.)

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## WAGES.

*Wages of mariners, &c.* Vide ADMIRALTY, (E 15.)

— of servants, &c. Vide JUSTICES OF PEACE, (B 51, 60.)

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## WAIFE.

### (A) Waife.

(A 1.) What shall be. p. 630.

(A 2.) What not. p. 630.

### (B) Bona fugitivorum et in erigend. positorum. p. 630.

### (C) Bona felonum. p. 631.

### (D) Bona confiscata. p. 632.

### (E) Deodand.

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(E 2.) What not. p. 633.

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### (G) Treasure-trove. p. 635.

### (H) Mines.

(H 1.) Of gold or silver. p. 636.

(H 2.) The stannaries. p. 636.

## (A) Waife.

## (A 1.) What shall be.

If a man steals goods, and being pursued, for fear of being apprehended, waives the goods out of his possession, those goods are said to be waife. 5 Co. 109. a.

So, if he thinks he is pursued, and having the goods in his possession flies, and waives the goods. 5 Co. 109. a.

Or if, to ease him in flight, he waives them. Stamf. Pl. Com. 186.

Though the thief leaves the goods at a common inn. R. 2 Rol. 809. l. 15.

## (A 2.) What not.

But if a thief steals goods, and conceals them in the ground, or other secret place, and afterwards flies, they are not forfeited as waife. R. 5 Co. 109. a. Mo. 572. Cro. El. 693.

Or, if he throws them into the house or manor of another, and there leaves them and flies. 5 Co. 109. a.

Or, if a man takes goods as a trespasser, and waives them. Stamf. Pl. C. 186. b.

Or, if he flies for fear of being apprehended, when he has not the goods in his possession. 5 Co. 109. a.

So, if a man is robbed, who had a safe-conduct, *tam in bonis quam in corpore*, and the thief upon pursuit waives them, those goods are not waifes. Stamf. Pl. C. 186. b.

So, if a thief leaves a horse, stolen, at a common inn for his meat, it is no waife. R. 2 Rol. 809. l. 10.

So, the goods of an alien cannot become waifes. Pal. 14.

All goods waived are forfeited to the king, and he shall keep them as his own, Stamf. Pl. C. 186., for the owner loses his property, because he did not freshly pursue the felon. 5 Co. 109. a.

And the king's bailiff, or another in the king's right, may seize them. St. P. C. 186. a.

But before seizure by the king or his patentee, the owner of the goods may take them, though it be twenty-years after the stealing. St. Pl. C. 186. b.

So, after seizure, if he makes fresh suit, and attaints the felon for such felony. Ibid.

And, by the common law, this was only when the felon was attaint in an appeal at the party's suit. 5 Co. 109.

But now, by the st. 21 H. 8. 11. if the felon be indicted and attaint by evidence given by the party, he shall have restitution of his goods. 5 Co. 111. a.

So, if the lord seizes goods as waife, he will not be excused for misuser, if there be fresh suit. R. 2 Leo. 192.

(B) *Bona fugitivorum et in exigend. positorum.*

*Bona fugitivorum* are the goods of him who is found upon record to have fled for felony; for, upon the presumption of his guilt, he forfeits all his goods, which he had at the time of his flight, to the king. 5 Co. 109. a. St. Pl. C. 183. b.

If the jury, who find the flight, acquit him of the felony. St. Pl. C. 183. b. 5 Co. 109. b.

[Flight, on a charge of felony, induceth forfeiture of goods, because he hath done what in him lay to stop the course of public justice; not, on a legal presumption of guilt, which must be at an end, on acquittal. Foster, 272.]

So, if it be found by inquest before the coroner, that he fled, though the jury, who try him, acquit him of the felony and also of the flight; for the king may hold to the record, which makes most for his advantage. St. Pl. C. 183. b. 5 Co. 109. b.

And such finding is not traversable. St. Pl. C. 183. b.

So, if it be found by verdict that an accessory before, or after, fled. St. Pl. C. 184. a.

Or, by inquest before the coroner, that an accessory before fled. Ibid.

So, if the flying was only for petit larceny. Ibid.

So, a man forfeits his goods by the flight found, though he has a pardon of the felony. Ibid.

Though the flight was before or after arrest. Ibid.

Or, he was killed in his flight, so that he cannot be acquitted or attainted. St. Pl. C. 184. a. 5 Co. 109. b.

So, if a man, accused of felony, does not appear, but process goes till an exigent is awarded against him, he forfeits his goods, though he be afterwards acquitted; for it is tantamount to a flight. St. Pl. C. 184. b. 5 Co. 110. b.

Though there be a fault in the writ or count, for which the writ abates. St. Pl. C. 184. b.

Or, he was imprisoned after exigent, by which the outlawry upon it is reversed. St. Pl. C. 184. 5.

But a man does not forfeit goods by flight found, if he is not afterwards indicted, if he is afterwards alive. St. Pl. C. 184.

Nor, if the flight is found before the coroner, when he has no jurisdiction; as, if he finds the flight of an accessory after the fact. St. Pl. C. 184. a.

So, if he does not forfeit by award of an exigent, if the exigent be reversible. St. Pl. C. 184. b. 5 Co. 111. a.

### (C) *Bona felonum.*

*Bona felonum* are the goods of any one convicted of felony; for he forfeits to the king all his goods and chattels, which he had at the time of the conviction. 5 Co. 110. a.

So, a clerk convict forfeits all the goods which he had at the time of conviction, or after, till purgation or pardon. St. Pl. C. 185. 5 Co. 110. a.

So, now, when by st. 18 Eliz. 7. after clergy allowed, he shall be burned in the hand, and immediately delivered, he forfeits the goods which he had at the time of conviction, though not such as he had after. R. 5 Co. 110.

So, if a man be *felo de se*, he forfeits all the goods which he had at his death, if he is found *felo de se* by inquest before the coroner, or by presentment before justices, who have conusance of felony. R. 5 Co. 110. b.

By grant of the goods *fugitivorum et felonum*, the grantee shall have the debts and specialties of fugitives, &c. as well as other goods, though there are no special words. 2 Rol. 195. l. 20. Dub. 2 Leo. 56.

And it shall be a debt where the specialty was, not where payable. R. 2 Leo. 56.

The goods of fugitives or felons can only be claimed by the king, or by his grant. 5 Co. 109, 110.

And not by prescription; for they are not forfeited, till found upon record. 5 Co. 110.

Yet a county palatine, which has *jura regalia*, may also claim *bona felonum* by prescription. R. 1 Rol. 399.

If the king grants to B. *bona felonum qualitercunque damnatorum* of his tenants, he shall have the goods; if the tenant be attainted of petty treason, as well as other felony. 2 Rol. 194. l. 53.

But the grantee shall not have the goods of those attainted of high treason. 2 Rol. 194. l. 50.

### (D) *Bona confiscata.*

So, if the owner omits any part of the goods stolen, in his appeal, they are forfeited to the king in respect of the connivance. 5 Co. 110. a.

So, if he brings a malicious appeal; as, for his goods which the appellee had by his bailment or by finding. 5 Co. 110. a.

So, if a man is indicted for stealing goods, which were his own goods, and he disclaims them, they are forfeited to the king; for *capit fiscus*. St. Pl. C. 186. a.

Or, if a felon disavows the goods taken in his possession, and afterwards he is attainted for other goods. Ibid.

### (E) *Deodand.*

#### (E 1.) What shall be.

*Omnia quæ movent ad mortem sunt deodanda.* Dy. 77. b. 5 Co. 110. b.

And, therefore every beast, or thing moveable inanimate, which occasions the death of a man within the body of a county, without the default of himself or another, shall be forfeited to the king as a deodand, to be employed in *eleemosynam*. 3 Inst. 57.

Though the thing was not in motion at the time, if it be moveable. St. Pl. C. 20.

And, as well where the man by misadventure falls upon the thing, as where the thing falls upon him. Ibid.

And therefore, if the sword of B. is used by A., and another is killed with it, it will be a deodand. 3 Inst. 57. H. 33.

If a man falls from a ship into fresh water, and is killed, the ship will be a deodand. H. 33.

If he falls from a horse when he plunges in the water. Semb. 2 Rol. 23.

If an animal kills a child under fourteen, viz. age of discretion, yet it shall be a deodand. 3 Inst. 57. H. 33. Per two J. semb. Ray. 208.

And all things moving with the thing which occasioned his death, are deodand. St. Pl. C. 20. b.

So, if a man, riding upon a carriage, falls from it, and the horses draw

draw the carriage upon him, by which he dies, the horses and carriage are deodand. St. Pl. C. 20.

So, if the carriage be loaden with hay, the hay and the carriage are deodand. St. Pl. C. 20. b.

So, though he falls from the carriage by the motion only of one horse. St. Pl. C. 20. a.

So, if a man is thrown from a carriage by overturning, under the wheel of a waggon next to it, and the waggon being loaden, goes over him and kills him, the carriage, waggon, loading, and horses are deodands. R. 1 Sal. 220.

So, if a horse throws a man into the water, and the wheel of a mill kills him, the horse and wheel are deodands. 1 Sal. 220. Vide post, (E 2.)

If one tree falls upon another, which causes the death of a man, both trees are deodands. 1 Sal. 220.

[But deodands do not meet with countenance in Westminster hall; when a jury has found too little, the courts will not interpose in favour of the crown, or lord of the franchise (though they will, if it has found too much in favour of the subject). Foster, 266.]

[Thus if A., sitting on his waggon, falls, the horses draw on the waggon, the fore-wheel crushes his head, and he dies, and the coroner's jury find the wheel only is the deodand, the court will not quash the inquisition. Foster, 266, 267.]

[No man can prescribe to it; it must be by the king's grant. Foster, 266.]

(E 2.) What not.

But a thing which does not move with that which is the cause of the death is not a deodand, though it is joined to it; as, if a man falls from the wheel of a carriage, and is killed, but the carriage does not move, the wheel only shall be forfeited. St. Pl. C. 20.

If a man falls into the water, and is carried by the water under a mill, and there pressed to death by the wheel of the mill, the wheel only shall be forfeited. St. Pl. C. 20. b. Vide infra.

If a man falls from his horse upon a trunk, and breaks his head upon it, by which he dies, the horse only shall be forfeited. St. Pl. C. 20. b.

If he is thrown by the motion of the horses from a cart laden with litter, the cart and horses are deodand, not the litter. Ibid.

If thrown from a horse, by the violence of the water, into the river, the horse is not a deodand. R. 2 Cro. 483. Acc. 2 Rol. 23. Pop. 136.

So, a thing fixed to the freehold shall not be a deodand; as, a door or gate of a house, forced by the wind against a man, whereby he is killed. Per two J. 1 Sid. 307.

Nor, a bell fixed to a church. Semb. 1 Sid. 207. Mod. Ca. 187. 1 Lev. 136.

Nor, a sail of a windmill. 1 Sid. 207.

Nor, a mill-stone or wheel of a mill. R. Mod. Ca. 187. D. Ray. 97.

Nor, a tree not severed, but blown by the wind against another. 1 Sid. 207.

Nor.

Nor, a thing consecrated before; as, a bell, which falls upon a ringer. Cont. St. Pl. C. 20. Semb. acc. 1 Sid. 207. 1 Lev. 136. Ray 97. Cont. Dy. 77. in marg.

Nor, a ship in the sea, or salt water. St. Pl. C. 21. a. 3 Inst. 57. H. 33.

So, if a child, within the age of discretion, (viz. under fourteen,) falls upon a thing moveable, and is killed, it shall not be a deodand. 3 Inst. 57.

Or, falls from a cart, ship, horse, &c. H. 33.

A deodand shall be forfeited to the king, or to him who claims by the king's patent. Dy. 77. a. 107. b.

And by inquisition before the coroner, it must be found, that it is deodand and the value. St. Pl. C. 21. a. H. 34. Greenwood, 22.

### (F) Estray.

If any man's cattle stray into the king's manor.

So, if they stray into the manor of any other lord, who has title to estrays by prescription or grant, and continue there for a year and a day, (being proclaimed at the next markets and churches) without challenge, the property is vested in the lord. Brit. Ca. 17. Bend. pl. 27.

A swan may be an estray. 1 Rol. 878. l. 30. 7 Co. 17.

So, if cattle stray into the manor of A., and within the year stray to the manor of B., and continue there for a year and a day, and are proclaimed, B. shall have them as estrays. 1 Rol. 878. l. 40.

So, if the first manor was the king's manor. Qu. 1 Rol. 878. l. 40.

So, if A. leases his manor, in which an estray was, before the year expired, and then the year and day expire, the lessee shall have it, and not the lessor; for he had the custody only during the year, and the property vests in him who has the custody at the end of the year and day. R. 12 Co. 101.

So, if a stranger, within the year, takes the cattle, and puts them into the manor again as his own, and they continue there for a year and a day, they will be an estray. Semb. 1 Rol. 879. l. 3.

But, if it does not continue in the manor for a year and a day, without challenge, it will not be an estray; as, if the lord puts it into a place out of the manor. R. Pal. 486.

Though it continues for three quarters of a year, and then continues in another manor or land, to which it strayed, for the residue of the time.

And the lord cannot retake it, if it strays into another's land before the year expires; for no property is vested in him till after a year and day. Bro. Estray, 11. Cont. 12 Co. 101. R. that he may, if the other does not seize it as an estray. Hut. 67.

So, if the lord, or his bailiff, does not seize it as an estray, it shall not be so; for that begins the property, and the lord may chase it out of his land if he pleases. R. Hut. 67.

So, cattle which come for common, cannot be estrays, though they continue there above a year and day. Bro. Estray, 13.

Nor, the king's cattle, which come into the manor of another for a year and day. 1 Rol. 878. l. 35.

So,

So, it will not be an estray by the common law, though it continues for a year and day, if it be not proclaimed at the two next markets, at least upon market-days. Bro. Estray, 3, 4, 5. 10.

And at two markets within the same county. Semb. 1 Rol. 878. l. 47.

And also at two parish churches. Semb. Cro. El. 716.

So, if the lord uses cattle taken as an estray, by riding, work, &c. he will be a trespasser *ab initio*. R. 2 Cro. 147. Yel. 96. 1 Rol. 879. l. 15. 12 Co. 101.

So, a custom alleged. to put cattle taken as an estray into a moor, part of the manor, and there fetter them, if they are unruly, is not good. R. 1 Rol. 879. l. 25.

But using an estray for necessity is justifiable; as to milk a cow. R. 1 Rol. 879. l. 20. 2 Cro. 148. 12 Co. 101.

To put fetters upon a colt, which cannot be otherwise kept within the fences. Per Tanf. 1 Rol. 879. l. 30. Hut. 67. Winch. 68. 124.

So, he may put it in his stable. Hut. 67.

So, if the owner challenges the cattle, seized and proclaimed as an estray, within the year, the lord may detain them till reasonable amends are tendered for his pasture. R. 1 Rol. 879. l. 35. Bro. Estray, 1. 12 Co. 101. Hut. 67.

And the detainer is justifiable, if he does not tender reasonable amends, though the lord demands what is unreasonable. 1 Rol. 879. l. 40.

Yet the owner may take upon an offer of amends, though he does not tender a certain sum. R. Sal. 686.

If the lord dies before the year expires, and afterwards the estray continues in the manor for the year and day; yet the executor of the lord shall have it, and not the heir; for when the year is expired, the property relates to the seizure. Mo. 11.

After seizure, the lord shall be charged for trespass done by an estray. Hut. 67.

And he shall have a replevin, if a stranger takes it. Ibid.

Or, trespass. Winch. 68.

### (G) Treasure-trove.

Treasure-trove is when a man finds coin or plate, of gold or silver, the owner whereof is not known, then it belongs to the king. St. Pl. C. 39. 5 Co. 108. b. 3 Inst. 132.

If it is found in the ground, a wall, or other place. 3 Inst. 132.

So, it may belong to another by prescription, or the king's grant. Ibid.

But it is not said to be treasure-trove, if it be other metal than gold or silver. Ibid.

Or, if it be found upon the land, and not under ground, in a wall, &c. St. Pl. C. 39.

Nor, if the owner can be known. Ibid.

Though the owner be dead; for his executor or administrator shall have it. St. Pl. C. 39. b.

He

He who finds treasure ought to give notice thereof immediately to the king's bailiff, &c. or coroner. St. Pl. C. 40. a.

And the coroner may inquire of the treasure found, and by whom. St. Pl. C. 40. a. 49. 50. b.

### (H) Mines.

#### (H 1.) Of gold, or silver.

By the common law, all mines of gold or silver within the realm belong to the king, whether they are within the lands of the king, or of a subject. R. Pl. Com. 313. 336.

Though they are not mentioned in the st. 17 Ed. 2. *de prerogativa regis*; for there are several of the king's prerogatives not mentioned there. Pl. Com. 322. a.

So, all mines of copper, tin, lead, iron, or other base metal, in which *aliquid auri aut argenti habet*., for such are royal mines. R. per nine J. three cont.

If the gold or silver does not exceed the base metal in value. Pl. Com. 336. b.

And the reporter makes a quære, if the gold or silver are not of greater value, otherwise the king will have all mines. Pl. Com. 340. a.

So, liberty of digging and carrying away the ore, and all necessary incidents, belong to the king. Pl. Com. 336.

And though the king grants lands in which mines are, and all mines in them; yet royal mines do not pass. R. Pl. Com. 336. b.

[In a grant of lands from the crown, if there is a bare reservation of royal mines, without right of entry, the crown cannot grant licence to another to search for such mines; but if they are once opened, it can restrain the grantee from working them, and work them itself, or grant licence to another so to do. 2 Atk. 19.]

But the king, by apt words, may grant mines of gold or silver, or other metals mixed with gold and silver, to a subject, and sever them from the crown. R. Pl. Com. 336. b.

As, if *ex certa scientia*, &c. he grants to a stranger all mines which he has in the land of B., for the words cannot be satisfied but by royal mines there. Per Dyer, Pl. Com. 337. a.

And now, by the st. 1 W. & M. sess. 1. c. 30. s. 4. no mine of copper, tin, iron, or lead, shall be taken to be a royal mine, though gold or silver may be extracted out of the same.

And by the st. 5 & 6 W. & M. 6. the owner of any mine, wherein is copper, tin, iron, or lead, may work the same, though claimed to be a mine royal; provided the king, or any claiming under him, paying in thirty days after ore laid on the banks, for all clean and merchantable ore of copper 16*l.* per ton; of lead 9*l.* per ton; of tin and iron 40*s.* per ton, may have such ore; except tin ore in the counties of Devon and Cornwall.

#### (H 2.) The stannaries.

So, the mines of tin in Cornwall are the revenue of the prince, as duke of Cornwall. 2 Rol. 171. (K). Vide in Courts, (L 1, &c.)

## WAIVER.

Vide **BARON AND FEME**, (R—S 4, &c.—T).—**PLEADER**, (R 15.)

## WALES.

### (A) **Wales.**

(A 1.) Part of the dominions of England. p. 637.

(A 2.) Subject to its laws. p. 637.

(A 3.) Shall have its proper counties. p. 638.

### (B) **What process goes to Wales out of the courts of Westminster.**

(B 1.) Mandatory writs. p. 638.

(B 2.) *Capias utlagatum*. p. 639.

### (C) **What process does not go thither.** p. 639.

### (D) **Trials for lands, &c. in Wales.** p. 640.

### (A) **Wales.**

(A 1.) Part of the dominions of England.

Wales was always feudatory to the kingdom of England. 2 Inst. 195. 4 Inst. 239.

Held of the crown, but not parcel. Per Cook, 1 Rol. 247. 2 Rol. 29.

And therefore the kings of Wales did homage and swore fealty to H. 2. and king John. Brad. Hist. 299. 330. 480.

So, to H. 3. Brad. 663.

And 11 Ed. 1. upon the conquest of Leuellin prince or king of Wales, that principality became a part of the dominion of the realm of England. 2 Inst. 195. 4 Inst. 239.

And by the st. Walliæ, 12 Ed. 1. it was annexed and united to the crown of England *tanquam partem corporis ejusdem*. 4 Inst. 240. 1 Vau. 300. 400. 2 Rol. 29. 2 Mod. Ca. 140.

And by the st. 27 H. 8. 26. reciting that it was always incorporated and united, it is enacted, that the dominion of Wales shall continue for ever incorporated, united, and annexed to the realm of England.

Yet if the st. Walliæ, made at Rutland 12 Ed. 1. was not an act of parliament (as it seems that it was not), the incorporation made thereby was only an union *jure feudali et non jure proprietat*. Vau. 414.

(A 2.) Subject to its laws.

Wales before the union with England was governed by its own proper laws. Vau. 300. 399. Cro. Car. 247. Jon. 255.

But by the st. of Rutland, 12 E. 1. the king says *leges et consuetudines partium*

*partium illarum fecimus recitari, quibus intellect. quasdam de concilio procerum deleuimus, quasdam permisimus, quasdam correximus, et alias adjiciend. decreuimus.* Vau. 400.

And since laws made in England bind people in Wales (as, in Ireland); if it be named, but not otherwise. Vau. 300. 400. 415.

And now, by the st. 27 H. 8. 26. all in Wales shall have and inherit all liberties, rights, privileges, and laws, in this realm, and all other his majesty's dominions, and all other his majesty's natural-born subjects.

And shall be inheritable to manors, lands, &c. in Wales, in the same manner and after the form of the English laws, without division or partition, and not after any tenure or form of Welsh laws and customs.

And that the laws and statutes of this realm, and no other, shall be had, used, and executed in the said dominion of Wales, in like manner as in this realm, or as by this act shall be further established.

And therefore the statutes, then made or afterwards to be made, are all induced into Wales. Vau. 215.

### (A 3.) Shall have its proper counties.

By the st. W. 12 Ed. 1. there were six counties erected in Wales, viz. Anglesey, Carnarvon, Merioneth, Flint, Carmarthen, and Cardigan. 4 Inst. 239.

But the st. 34 H. 8. 26. mentions Glamorgan and Pembroke also as antient counties.

The marches of Wales were lordships lying between the counties of England and Wales, and not in any county. Vau. 415.

By the st. 27 H. 8. 26. and 34 H. 8. 26. Wales was divided into twelve counties; for several lordships marchers were annexed to divers shires in England, and several to counties of Wales (viz. to Salop, Hereford, and Gloucester, in England; and to Glamorgan, Carmarthen, Pembroke, Cardigan, and Merioneth, in Wales), and the residue were erected into five new counties, viz. Monmouth, Brecknock, Radnor, Montgomery, and Denbigh, of which Monmouth was annexed to the realm of England, and the four others to the dominion of Wales.

### (B) What process goes to Wales out of the courts of Westminster.

#### (B 1.) Mandatory writs.

To all the dominions acquired to the crown of England some of the king's writs run; as, mandatory writs out of chancery. Vau. 401.

Such as writs of safe-conduct. Ibid.

Writs of protection. Ibid.

*Ne exeat regnum.* Vau. 402.

*De leproso amovendo.* Ibid.

*De apostata capiendo.* Ibid.

So, a writ of error. Ibid.

So, a *certiorari* lies to the justices of the grand sessions in Wales to remove an indictment for felony to B. R. R. 2 Cro. 484. 1 Rol. 395. l. 5. Dub. Cro. Car. 331. 1 Rol. 395. l. 7. Dub. 1 Mod. 64. 68. R. 1 Vent. 93. 146. R. 2 Rol. 29. R. Sal. 146. Semb. 2 Mod. Ca. 136—145. Vide post, (D).

[So,

[So, from the quarter sessions. 4 Burr. 2456.]

So, a *habeas corpus* to remove a person indicted there. R. 2 Mod. Ca. 137.

(B 2.) *Capias utlagatum*.

So, a *capias utlagatum* always goes directed to the sheriffs of Wales; for it is in the nature of a mandatory writ. Vau. 397. 414.

By the st. 1 Ed. 6. 10. all writs of special *capias utlagatum*, single *capias utlagatum*, *non molestandum*, and all other process for or against any person outlawed, may be directed to the sheriff of any of the counties in Wales.

(C) What process does not go thither.

But the union of Wales to the kingdom of England by the st. Wallia, 12 Ed. 1. or by the st. 27 H. 8. 26. does not subject Wales to the jurisdiction of the courts of England. Vau. 400. 415.

And, therefore, generally, *breve domini regis non currit in Wallia*.

[*Breve domini regis de latitat non currit in Wallia*. 1 Wils. 193. Doug. 213. contra.]

An original writ in real actions does not run in Wales. Vau. 417.

And though real actions for a seignior, lands, church, &c. in the marches of Wales, were brought and tried in an adjoining county before the st. 27 H. 8. 26. yet since that statute they are not used. Vau. 417. Vide post, (D).

So, an appeal does not lie in the county next to Wales for a murder committed in Wales. R. Cro. Car. 247.

So, an indictment in Wales for felony in the same county shall not be removed by *certiorari* to be tried in the county adjoining. Dub. Cro. Car. 248. 381, 2. Semb. 2 Mod. Ca. 137. 140. Vide ante, (B 1.)

[So, civil proceedings shall not be removed by *certiorari* from the courts of great sessions, without special cause. Doug. 751. n.]

So, a person indicted for murder in Wales may be removed by *habeas corpus*, and tried in the next English county. Vide post, (D).

So, judicial process, as a *capias ad satisfaciendum*, or *feri facias*, upon a judgment, does not go to a sheriff of Wales. R. in C. B. Godb. 214. R. cont. per three J. 2 Mod. 10. Acc. Vau. 397. 417.

Though it be upon a judgment in B. R. R. cont. in B. R. 2 Bul. 156, 7. Per Dod. 2 Cro. 484. Semb. cont. per three J. but Twisd. acc. and therefore nothing done. 2 Sand. 193. 1 Lev. 291.

Nor, a *scire facias* upon a judgment against an heir and tertenants. R. cont. per three J. 2 Mod. 10. but Vau. acc. 397. 417.

Nor, a *scire facias* against bail, who live in Wales. R. cont. in B. R. 2 Bul. 54.

Nor, a *testatum scire facias*. Dub. 1 Lev. 291.

So, if the defendant dies after judgment against him in Wales, and A. takes administration to him in London, the judgment in Wales shall not be removed by *certiorari* to B. R. or C. B. to enable the plaintiff to take a *scire facias* out of the superior court against the administrator. R. Cro. Car. 34.

(D) Trials

## (D) Trials for lands, &amp;c. in Wales.

Real actions for a seigniorship or barony within the marches of Wales, shall be brought and tried in the county within England next to such seigniorship or barony. Vau. 412. Vide Action, (N 2.)

And this seems founded upon an antient statute now lost. Vau. 404.

So, by the st. 26 H. 8. 6. justices of peace and gaol delivery in counties adjoining to Wales may hear, &c. all felonies (and their accessaries) committed in Wales.

And this is not repealed by the st. 34 & 35 H. 8. 26. that judges of Wales may hold pleas of the crown, and shall inquire, &c. of all criminal offences committed within their limits; for the king has a concurrent jurisdiction. 2 Mo. Ca. 145.

And therefore, a person indicted there for murder, after a *nolle prosequi* upon the indictment there, was removed by *habeas corpus* to Hereford, and there indicted, and tried and convicted, and after judgment against him in B. R. executed. R. 2 Mod. Ca. 136—145.

[Judges of assize in adjacent English county have concurrent jurisdiction in felonies, with the grand sessions, through all Wales, and not in the lordships marchers only. Str. 553.]

[*Habeas corpus* may be granted, without affidavit, to remove a prisoner indicted, to take his trial in the adjacent English county. Str. 945.]

But trial in the next county for lands in Wales extends only to a seigniorship or barony within the marches there. Vau. 412.

It does not extend to an indictment or appeal for murder or other felony there, which shall be tried in the grand sessions. R. Jon. 255.

After issue joined a *venire facias* shall be awarded for trial.

And it may be returnable the day after the teste; for the process shall be *de die in diem* in the same sessions. R. Cro. Ca. 179.

[If there be a bill of exceptions to the rejection of evidence in the court of great sessions in Wales, and on error in B. R. the evidence be deemed admissible, the court of B. R. will award a *venire de novo* into the next English county. 2 T. R. 125.]

If there be a bill in the grand sessions against A. and B., to which A. who lives there appears, if B. upon service in London does not appear, his land in Wales may be sequestered. Dub. 2 Mod. Ca. 374.

[By st. 13 Geo. 3. c. 51. if plaintiff in personal or in transitory action, where the cause arises in Wales, and is tried in the next English county, does not recover by verdict, debt or damages to 10*l.*, and judge certifies that defendant resided in Wales, at service of mesne process, judgment of nonsuit shall be entered, unless judge certifies that the title of land was chiefly in question, and the cause proper to be tried in English county. Plaintiff is to have his damages out of defendant's costs; the verdict is a bar to other actions for the same.]

[If plaintiff, an attorney, by attachment of privilege, sue a defendant resident in Wales, for words spoken there, and lay the venue in the Welch county, (in order that the cause may be tried in the next English county,) and the judge at the trial certify that the defendant was resident in Wales, &c. that fact, thus certified, may be suggested on the judgment roll, in order to entitle the defendant under this statute to enter a judgment of nonsuit. 6 T. R. 500.]

Cove-

[Covenant for not levying a fine is a personal action within the Welsh judicature act. 1 N. R. 267.]

[Herefordshire is the next adjoining English county to South, Salop to North Wales. 2 M. & S. 270.]

[Justices shall not make deputies but for calling courts, taking fines, &c.]

[King may nominate deputy, in case of sickness of justice.]

[There may be special juries.]

[Justices may appoint persons to take affidavits, and recognizances.]

[The ground of a judgment in one of the courts of great sessions may be questioned in an action on that judgment. Doug. 6.]

Vide more concerning Wales in Action, (N 2.)

## WAR.

(A) War. p. 641.

(B) Service of the king in his war.

(B 1.) By tenure. p. 641.

(B 2.) By contract. p. 642.

(B 3.) By commission of array. p. 642.

(B 4.) What arms every one may keep. p. 642.

(B 5.) Remedy against a deserter. p. 642.

(B 6.) But the king cannot charge the subject for the levying of forces without authority of parliament. p. 642.

(B 7.) Nor, for maintenance of the forces. p. 643.

(A) War.

The king has power to make war and peace. Vide in Prærogative, (C 1.)

How soldiers are to be levied for the land or sea service, vide in Prærogative, (C 2.)

Command of the forces. Vide Prærogative, (C 3.)

Erection or raising of forts. Vide Prærogative, (C 4.)

After war declared, a proclamation issues to notify it.

(B) Service of the king in his war.

(B 1.) By tenure.

*Mavult princeps* to be served by his own subjects, rather than by others, in his wars. Co. L. 69. a.

By the st. 7 Ed. 1. it belongs to the king to defend all force, &c. and the earls, barons, &c. are bound to aid their sovereign at all seasons, if need be.

If the king makes a voyage royal into Scotland, &c. whosoever holds *per feudum militare* ought to be with the king well arrayed for the war

for forty days, and so *pro rata*, if he holds by a moiety, &c. of a knight's fee. Lit. s. 95.

And a knight's fee was computed not by the quantity, but by the value of his land; for 20*l.* per annum was a knight's fee. Co. L. 69. a.

(B 2.) By contract.

So, the king by indenture inrolled in the exchequer may contract with a knight, &c. who has tenants, &c. in the country for so many men for such a time to serve the king in his wars. Co. L. 71. a.

And the departure of a soldier after muster, &c. was felony by the st. 18 H. 6. 19. (which is now of no force, because such form of militia is disused). Co. L. 71. a. R. 6 Co. 27. a. Vide Justices, (8. 8.)

(B 3.) By commission of array.

So, the king may issue a commission of array, to raise soldiers pursuant to the direction 5 H. 4. Semb. 2 Rush. 1229—1233.

(B 4.) What arms every one may keep.

So, by the st. Wint. 13 Ed. 1. 6. every man shall have in his house harness to keep the peace according to the ancient assise, viz. he that hath under 40*s.* per annum, gis-arms, knives, and less weapons; and he that hath under 40 marks in goods, swords, knives, and less weapons; he that hath above 40*s.* and under 5*l.* per annum, a sword, bow and arrows, and a knife; if above 5*l.* per annum, a doublet, iron breast-plate, sword and knife; he that hath 10*l.* per annum, and 20 marks in goods, an hauberge, iron breast-plate, sword, and knife; he that hath above 15*l.* per annum, and 40 marks, an horse, besides the hauberge, &c.

And by this statute a view of armour shall be by two constables twice a year.

By this statute and the articles of inquisition thereon 34 Ed. 1. inquiry shall be made, if the people have weapons in their houses according to the quantity of their lands and goods.

But by the st. 1 Ed. 3. 5. none shall be charged to arm himself, otherwise than he was wont to be.

[Vide in Justice of Peace.]

(B 5.) Remedy against a deserter.

By the common law, if a soldier, after receiving the king's wages, departs from the service, upon a certificate by the captain to chancery, a writ goes to the king's serjeant at arms *ad capiend. conduct.*, &c. 2 Inst. 53.

The receiving pay as a soldier, subjects the receiver to military jurisdiction. 2 H. Bl. 69.]

Or, a writ to the sheriff, *ad arrestandum B. qui pecuniam recepit ad profeiscendum in obsequium domini regis, et non est profectus.* 2 Inst. 53.

(B 6.) But the king cannot charge the subject for the levying of forces without authority of parliament.

But by the st. 1 Ed. 3. 7. confirmed by the st. 4 H. 4. 18. whereas commissions were granted to levy men of arms, and convey them to the king

### *Service of the King in his war.*

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king at the charge of the shire, it was enacted, it shall be done so no more. Vide Parliament, (H 22.)

And 20 Ed. 3. the king confirmed the ordinance, that the subject shall not be charged for arms. 2 Rol. 173. l. 4.

By the st. 25 Ed. 3. 8. no man shall be compelled to find men of arms, &c. if it be not by common consent in parliament, unless they hold by such service. Confirmed by 4 H. 4. 13.

#### (B 7.) Nor, for maintenance of the forces.

So, by the st. 3 Car. (being a petition of right) it was complained that soldiers and mariners in divers counties have been dispersed, and the inhabitants against their wills compelled to receive them into their houses, and to suffer them to sojourn there, and it was prayed, that the people may not be so burthened in time to come; to which the king answered, *soit droit fait come est desire*.

By the st. 1 Ed. 3. 7. no commissions shall be awarded to prepare men of arms, and convey them to the king in Scotland, or elsewhere, at the charge of the shires.

By the st. 18 Ed. 3. 7. men of arms, &c. chosen to go in the king's service out of England shall be at the king's wages from the day they depart out of the counties till they return.

So, by the st. 1 Ed. 3. 5. none shall be compelled to go out of his shire, but on necessity, and sudden coming of strange enemies, and then but as usual.

Vide more concerning war in Discent, (D 6.)—Justices, (K 4.)—Officer, (K 4.)—Prærogative, (C 1, &c.)

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### WARD.

Vide GUARDIAN, (H 1, &c.)—PRÆROGATIVE, (D 59.)

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### WARDEN.

Warden of the Cinque Ports. Vide FRANCHISES, (E 3.)

— of the Fleet. [A bill cannot be filed against him in vacation. 2 Mars. 49. 6 Taunt. 347. 2 Mars. 54. 6 Taunt. 352.] Vide Chancery, (B 8.)

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### WARDMOTE.

Vide COURTS, (O 6.)

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### WARRANT.

Vide FORCIBLE ENTRY, (D 18, 19.)—IMPRISONMENT, (H 6, &c.)—PLEADER, (3 K 26.)—(3 M 23.)

## WARRANT OF ATTORNEY.

[The rule which requires that an attorney on the part of a prisoner should be present when a bond and warrant of attorney are executed by him, only relates to persons in custody on mesne process. 1 T. R. 715.]

Vide Amendment, (E 1, 2.)—Attorney, (B 7, 8.)

## WARRANTY.

Vide GARRANTY.

~~Warrantia chartae~~. Vide GARRANTY, (K 1.)—PLEADER, (S N 1, &c.)

## WARREN.

Vide CHASE, (D—F).

## WAST.

### (A) Wast, by the common law.

(A 1.) Prohibition of wast. p. 645.

(A 2.) Action of wast. p. 645.

### (B) Wast, by the custom of London.

(B 1.) Wast lies. p. 646.

(B 2.) And writ of estrepement. p. 646.

### (C 1.) Wast, by the statute of Glouc. 5.

(C 2.) By whom it lies. p. 647.

(C 3.) By whom not. p. 648.

(C 4.) Against whom it lies. p. 649.

(C 5.) Against whom not. p. 651.

### (D 1.) Wast, what shall be.

(D 2.) In houses. p. 652.

(D 3.) In gardens, &c. p. 654.

(D 4.) In land, meadow, &c. p. 654.

(D 5.) In wood, &c. p. 655.

### (E) What shall not be wast.

(E 1.) In respect of the value. p. 656.

(E 2.) If the place be not demised. p. 657.

(E 3.) Or, demised without impeachment. p. 657.

(E 4.) If done by default in the lessor. p. 657.

(E 5.) Or, by tempest or enemies. p. 658.

(F) Penalty for wast.

(F 1.) Done by guardian in chivalry. p. 658.

(F 2.) Done by tenant by curtesy, dower, for life, or for years. p. 658.

[(F 3.) Action in the nature of waste.] p. 659.

(A) Wast, by the common law.

(A 1.) Prohibition of wast.

By the common law a prohibition might be awarded against a tenant in dower, or guardian in chivalry, for prevention of wast by them. 2 Inst. 299.

So, against tenant by the curtesy. Cont. 2 Inst. 145.

And such prohibition lay *quia timet*, before wast committed.

So, if a writ of right or other action is brought, and *pendente lite* the tenant commits wast, a writ of estrepement shall go. R. Dal. 1.

So, if error be to reverse a common recovery. R. Cro. El. 774.

So, a prohibition of wast lay by the patron against the parson, vicar, to prevent wast in the glebe or church-yard.

And the st. 35 Ed. 1. *ne rector prosternat arbores in cæmeterio* was only affirmance of the common law. R. 11 Co. 49 b.

So, it lay against a bishop, abbot, prebend, &c.

So, if the incumbent commits wast in the glebe or lands of the rectory *pendente lite* in *quare impedit*, a prohibition shall be granted. R. Hob. 36.

So, since the st. of Marl. 24. it lies against a lessee for life, or for years. 2 Inst. 146.

So, a prohibition lies now, since the st. of Gloucester, 5. where it would lie at common law. 2 Inst. 299.

Prohibition of wast was by a writ directed to the sheriff commanding him, *quod non permittat quod A. faciat vestum*, &c. 2 Inst. 299.

And thereupon the sheriff might take the *posse comitatus*, and prevent wast. 2 Inst. 299.

But now, by the st. W. 2. 14. it is ordained, that no writ of prohibition shall be awarded for the future, but a writ of summons. 2 Inst. 146. 389.

(A 2.) Action of wast.

So, by the common law, after wast committed, an action lies against tenant in dower, or guardian in chivalry.

So, against tenant by the curtesy. 2 Inst. 145. 300.

And it lay against all tenants in dower, by the common law, or by custom, *ad ostium ecclesiæ*, *ex assensu patris*, or *de la plus belle*. 2 Inst. 303.

So, against a guardian in right or in deed. 2 Inst. 305.

By grant of a subject, or of the king. 2 Inst. 305.

So, against a guardian in socage, as well as in chivalry, 2 Inst. 135. 305. F. N. B. 59. E. Cont. C6. L. 54. a.

But by the common law, wast did not lie against lessee for life or for years; for it was the laches of the lessor, that he did not provide against wast. 2 Inst. 299. 145. 5 Co. 13. b.

So, it does not lie by the assignee of the heir against tenant by curtesy, or in dower. 2 Inst. 301.

But wast, does not lie in ancient demesne, because the court upon default at the grand distress cannot make a writ to the sheriff to go to the place wasted, according to the st. W. 2. 14. 2 Sand. 254.

## (B) Wast, by the custom of London.

### (B 1.) Wast lies.

So, by the custom of London wast lies at the common law for wast in houses there. 2 Inst. 299.

And now, since the st. of Glo. 5. wast lies there in cases within that statute as well as in others; for though the statute gives an action for wast in cases where it did not lie before, and gives also treble damages *et locum vestatum*, yet it does not take away the jurisdiction of any court which before held plea of wast. 2 Inst. 299. R. 2 Sand. 254.

### (B 2.) And writ of estrepement.

So, a writ of estrepement lies in London, *pendente placito*, or after judgment and before execution, to stay wast. 2 Inst. 328.

And it may be by original writ, sued out of chancery with the original in the suit, or after *pendente placito*, or judicial, granted by the court, and directed to the sheriff, the party, or both. 2 Inst. 328.

And this was explained by the st. of Glo. 13. which enacts, that if a plea be moved in London by writ, the tenant shall not commit wast or estrepement of the tenement demanded; and if he do, the mayor and bailiffs shall cause it to be kept at the suit of the demandant.

And now by the st. Glo. 13. it lies to prevent wast *pendente placito*, and it judicially issues out of the court where the action is depending. 2 Inst. 328.

So, estrepement lies in all real actions where damages are recovered. 2 Inst. 328.

So, in real actions, though no damages are to be recovered. Sembl. 2 Inst. 328.

And against every tenant.

So, against his leoffee, vouchee, prayee in aid. 2 Inst. 328.

So, against the tenant and a stranger. Ibid.

So, it lies in *scire facias* upon a fine and recovery, *quid juris clamat*, attaint, though no land is demanded. Ibid.

And if the land escheats *pendente placito*, the writ of estrepement extends to it. 2 Inst. 329.

In estrepement the tenant shall not have his age; for it is in nature of a trespass. 2 Inst. 328.

After estrepement delivered to the sheriff, he may resist him who attempts wast, and take the *posse comitatus*, and imprison him, if necessary. 2 Inst. 329.

Such

Such writ is only a prohibition from committing wast, and the parties may plead upon the attachment. Ibid.

By virtue of this writ the plaintiff recovers damages for the wast committed *pendente placito*. Ibid.

So, upon estrepement after judgment, though no prohibition before delivered. Ibid.

But in estrepement *pendente placito*, the plaintiff does not recover damages till the principal suit is determined. 2 Inst. 328.

Nor, damages for wast committed by a stranger *pendente placito*, without the privity of the tenant. Ibid.

In wast the plaintiff does not recover damages for the wast *pendente placito*, but the plaintiff must have a writ of estrepement. 2 Inst. 329.

If the defendant commits wast after a writ of estrepement, the plaintiff may declare on the writ of estrepement. Mo. 100.

To the declaration in a writ of estrepement, the defendant may plead no wast committed. Ibid.

If it be found by verdict in a writ of estrepement, that the defendant has committed wast, the plaintiff shall have judgment, and recover damages and costs, Ibid.

### (C 1.) Wast, by the statute of Glouc. 5.

And now by the st. 6 Ed. 1. 5. a man may have a writ of wast in chancery against a man, who holds by the law of England, or in other manner, for term of life, or years, or in dower; and he who shall be attainted of wast, shall lose the thing which he has wasted, and make satisfaction of treble of what the wast shall be taxed at.

And by st. W. 2. 13 Ed. 1. 14. prohibition of wast is taken away, and a writ of summons given for all wast.

By the st. of Marl. 52 H. 3. 23. all farmers were prohibited to commit wast, and this was the first statute against them. 2 Inst. 145.

And therefore, since this statute, if the lessee for life or for years had committed voluntary or permissive wast, he should answer full damages. 2 Inst. 145. Vide post, (F 2.)

By the st. W. 2. 13 Ed. 1. 22. if there are joint-tenants or tenants in common, and one commits wast, the other may have a writ of wast, whereupon the defendant shall have his election to have partition and take *locum vestatum* for his share, or to find surety that he will not take more than his proportion. 2 Inst. 403. Co. L. 200. b.

And this extends to joint-tenants, &c. only for life. 2 Inst. 402. Co. 200. b.

But it does not extend to wast in cattle, house, or other place for habitation. 2 Inst. 402.

Nor, to wast in a dovecote. Co. L. 200. b.

Nor, to wast by one parcener. Ibid.

### (C 2.) By whom it lies.

Wast is always supposed, to the disherison of the plaintiff, and therefore it shall be brought by him who has the immediate reversion, or remainder, in fee, or in tail. Co. L. 58. a.

A man who claims the inheritance by purchase, may have wast, as

well as if he claimed by descent, though the statute speaks only of inheritors. 2 Rol. 825. l. 44.

So, he who claims in remainder. 2 Rol. 825. l. 25.

So, a lord, who has the inheritance by escheat. 2 Rol. 825. l. 30.

The grantee of the king upon attainder. Co. Ent. 699. a.

So, he in reversion or remainder in tail, as well as in fee. 2 Rol. 825. l. 25. Hut. 110. 2 Inst. 302.

So, if tenant in common leases for years his part to his companion, he may have wast, and recover a moiety of the place wasted and of the damages. Per two J. Mo. 71.

So, he who has the inheritance may join another with him, who has not an estate of inheritance, in an action for wast; as, husband and wife may have wast, where the reversion or remainder is to them and the heirs of the husband. 2 Rol. 825. l. 41.

So, if the reversion be granted to A. and B. and the heirs of B., they may join. Co. L. 53. b.

So, a surviving parcener, and the husband of another parcener, being tenant by the curtesy, may join in wast. Co. L. 53. b. Dub. per Treby, Lut. 803.

So, two joint-tenants for life, and to the heirs of one, may join. Co. L. 53. b. 42. a.

So, it is sufficient, if the plaintiff has the immediate inheritance at the time of the action, though he had not at the time of the wast, or will not have by possibility after; as, if tenant for life or years, remainder for life, &c. commits wast, and afterwards B. in remainder dies, or surrenders, the reversioner shall maintain wast. Co. L. 54. a. 2 Rol. 829. l. 10. 25. Mo. 387. R. 5 Co. 76. Jon. 51. All. 82.

So, if a lease for life or years was made to A. remainder to A. *per auter vie*; for both estates are in the lessee. 2 Inst. 301.

So, if the mesne remainder or reversion for life was without impeachment of wast. R. Jon. 51. 2 Cro. 688.

So, if the remainder for life be upon a contingency, before the contingency happens, the reversioner may have wast. R. Al. 82.

Or, if there are contingent remainders or uses, before they come *in esse*. R. Al. 83.

So, if the remainder be only for years, the reversioner shall have wast, notwithstanding the mesne remainder. Co. L. 54. a. 2 Inst. 301.

[The person next entitled to an estate of inheritance after the tenant in possession, may maintain an action of wast, notwithstanding the intervention of a term for years between his estate and the estate of the tenant in possession. D. Ld. R. 327.]

[Where an estate of freehold intervenes, he cannot. D. Ld. R. 327.]

So, if a lease be made by him in reversion to commence at a future day; for this is only a future interest. Co. L. 54. a. 2 Rol. 829. l. 30.

### (C 3.) By whom not.

But wast does not lie by him who has not the immediate inheritance in him; and therefore, if a lease be to A. for life or years, remainder to B. for life, wast does not lie by him in fee, so long as the estate of B. continues. Co. L. 54. a. R. Al. 81. 2 Rol. 829. l. 10. 25. Per two J. Mo. 18. R. 2 Cro. 688. 2 Inst. 301.

So, if a lease be to A. for life or years, and he in reversion grants the

the reversion for life to B. during the continuance of the estate of B., he shall not have wast.

So, if he grants the reversion for years, he shall not have wast during the term. Co. L. 54. a.

So, if tenant in tail by fine grants, or bargains and sells *totum status suum*, the grantee shall not have wast; for he has no inheritance. R. 3 Leo. 60. Vide Estate, (B 33.)

Though he is tenant in tail, with remainder in fee; for, though the grantee has the fee, there is a mesne estate-tail. R. 3 Leo. 60.

So, wast does not lie by tenant in tail after possibility. 2 Rol. 825. l. 31.

Though wast was committed before the death of husband, or wife, upon whom the issue were to be begotten. Mo. 18.

So, if there be tenant for life, remainder to husband and wife in special tail, remainder to the heirs of the husband, and the wife dies without issue, the husband shall not have wast. Dub. Mo. 18.

So, wast does not lie by him, who had not the inheritance in him at the time of the wast done; and therefore it does not lie by an heir for wast in the time of his ancestor. 2 Inst. 305.

Nor, the successor of a sole corporation; as bishop, archdeacon, parson, &c, for wast in the time of the predecessor. 2 Rol. 824. l. 43. 49. R. 1 Rol. 432.

Nor, a younger son, for wast in the time of his elder brother, who died before actual seisin, whereby he makes his title as heir to his father. 2 Rol. 825. l. 10.

Nor, grantee of a reversion for wast before his grant.

Or, after the grant of the reversion, and before attornment. 2 Rol. 825. l. 15.

Nor, the grantor, for wast after grant of the reversion, and before attornment. 2 Rol. 825. l. 15.

Nor, a lord by escheat, for wast before the escheat. 2 Rol. 825. l. 6.

Yet wast lies by the surviving joint-tenant, for wast in the life of his companion.

And by a surviving parcener, for wast in her sister's time. 2 Inst. 305.

So, wast does not lie by him, who has not the same estate continuing in him, which he had at the time of the wast committed; as, if a reversioner, after wast committed, aliens, and retakes an estate to himself and his heirs, he cannot afterwards have wast, which consists in privity. Co. L. 53. b.

So, if he grants the reversion to the use of him and his wife and the heirs of himself. Co. L. 53. b.

(C 4.) Against whom it lies.

Wast by the common law was only against tenant by the curtesy, in dower, or guardian. Vide ante, (A 2.)

And now, by the st. of Glo. 5. it lies also against lessee for life, or years. *Per auter vie, quamdiu se bene gesserit, &c.* 2 Inst. 301.

But it is usually brought upon the statute against the tenant by the curtesy. F. N. B. 60. K.

So, it lies against a devisee for life, or for years. 2 Rol. 826. l. 25.

So,

So, if the estate for life or years be forfeited to the king for treason, &c. wast lies against the king's grantee, though he comes in the post. *Per Co.* 2 *Roll.* 826. l. 20. 2 *Roll.* 20.

If tenant for life or for years assigns his estate, wast lies against the assignee for wast done after the assignment. *Co. L.* 54. a. *R. Cro. El.* 688.

So, if lessee makes an underlease to B. who commits wast, an action lies against him.

If tenant by curtesy, or in dower assigns his estate, and the heir before or after the assignment grants his reversion, the grantee shall have wast against the assignee for wast afterwards committed; for the priority is gone. *Co. L.* 54. a. 2 *Inst.* 301.

If tenant in tail after possibility assigns his estate, wast lies against him. 2 *Inst.* 302.

If tenant by the curtesy makes a lease for years, and the reversioner confirms it, and tenant by the curtesy dies, wast lies against the lessee for years. 2 *Inst.* 302.

So, if tenant for life or years assigns, excepting the trees, and the assignee cuts them down, wast lies against him. 2 *Inst.* 302. 2 *Roll.* 454. l. 40.

So, if a lord enters upon his villein, wast lies against him for wast afterwards, though he comes in in the post. *Co. L.* 451. a. 2 *Inst.* 301.

So, it lies against an occupant. *Co. L.* 54. a. 2 *Inst.* 301.

Though he takes, as special occupant. *Co. L.* 54. a.

So, against him, who takes a term, as executor, or administrator. 2 *Inst.* 302. *Co. Ent.* 693, 694.

So, against an executor *de son tort* of a term. *R. 3 Mod.* 93.

Wast shall be brought, generally, against him who commits the wast. *Co. L.* 54.

And therefore, if lessee for life or for years commits wast, and afterwards assigns his estate to another, wast lies against him in the *tenet*. 2 *Roll.* 829. l. 45. 2 *Inst.* 302.

So, if a guardian commits wast, and afterwards grants over his ward. 2 *Roll.* 829. l. 50. *Cont. Co. L.* 54.

So, if grantee of a tenant for life or years upon condition commits wast, and afterwards the lessee enters for the condition broken. *Co. L.* 54. a. 2 *Inst.* 302.

So, it lies against tenant *per autre vie*, or for years, in the *tenet* after the death of the *cestuique vie*, or the term expired. 2 *Roll.* 830. l. 8. 14.

So, against an executor, who commits wast, and then assents to a devise of the term. 5 *Co.* 12. b.

So, against a successor, for wast by his predecessor deposed, *quandiu* he is alive. 2 *Roll.* 827. l. 40. 43.

So, against a husband, who has a term as survivor, for wast during the coverture. *Co. L.* 54. a.

But the action shall be against tenant by the curtesy, in dower, for life or for years, though wast be committed by a stranger. *Co. L.* 54. a. 2 *Inst.* 146. 2 *Roll.* 821. l. 5.

Though the lessee be an infant, feme-covert, &c. *Co. L.* 54. a. 2 *Inst.* 303.

Though a stranger disseises the lessee, and commits wast. 2 *Roll.* 821. l. 10. *Dr. 1 Leo.* 264.

Though

Though the lessee enfeoffs a stranger upon condition, who commits wast, and afterwards the lessee enters for the condition broken. 2 Rol. 828. l. 25.

Though the wast was for cutting down timber upon a contract with tenant in tail in his lifetime. R. Hard. 96.

So, if B. has common of estovers in a wood demised, and in taking his estovers he commits wast, an action lies against the lessee; for B. was a stranger for this purpose. 2 Rol. 821. l. 15.

So, if a monk commits wast, where his sovereign is guardian. 2 Rol. 821. l. 30.

If tenant in dower be of a manor, and a copyholder commits wast. 2 Inst. 303.

So, if tenant, by curtesy, or in dower, assigns his estate to B. who commits wast, an action lies by the heir against the tenant by curtesy, or in dower; for there is a privity between them. Co. L. 54. a.

And it must be against them, and not against the assignee. 2 Inst. 301.

So, by the st. 11 H. 6. 5. wast lies against the pernor of the profits, though he has assigned his estate. 2 Inst. 302.

And though there be an assignment by the assignee, it lies against the assignee who took the profits. R. 5 Co. 77. b.

And by him in remainder, as well as by him in reversion. R. 5 Co. 77. b.

So, if there be joint-tenants of an estate for life or years, and one commits wast, an action lies against both; but the treble damages shall be recovered only against him who committed the wast. 2 Inst. 302.

So, if they are joint-tenants of a ward, and one commits wast. Co. L. 54. a.

If one joint-tenant enters into religion, wast lies against his companion alone. 2 Rol. 828. l. 38.

So, wast lies against husband and wife for wast committed by the wife before coverture. 2 Rol. 827. l. 20.

Or, for wast committed during coverture, when the husband is seised or possessed in right of his wife, or jointly with his wife. 2 Rol. 827. l. 5. 16. 18. Qrp. El. 357.

(C 5.) Against whom not:

But if the king, tenant for life or years, commits wast, an action does not lie against him; for the king is not within the st. of Glouc. 5.

And therefore, if an estate for life or years be forfeited to the king for treason, &c. wast does not lie against the king. Mo. 335.

If tenant by curtesy, or in dower, or for life, dies after wast committed, wast does not lie against his executor or administrator. 2 Rol. 828. l. 34.

So, if lessee for years dies after wast committed, though the term goes to his executor or administrator. 2 Inst. 302.

So, if an abbot, &c. guardian, commits wast and dies, wast does not lie against his successor. 2 Rol. 827. l. 40.

If a woman, tenant in dower, takes husband, who commits wast, and then the wife dies, wast does not lie against the husband. 2 Rol. 827. l. 22.

So,

So, if the wife was tenant for life; for the husband was seised *in jure uxoris*. Co. L. 54. a. 2 Inst. 301. Semb. Cro. EL. 357.

So, wast does not lie against a guardian in socage; for he may have account. Co. L. 54. a. Cont. 2 Inst. 135. 305. Vide ante, (A 2.)

Nor, against tenant by statute-merchant, staple, recognizance, or *elegit*; for the conusor may have a *venire facias ad computandum*, and *recoupe* in damages. Co. L. 54. a. 2 Inst. 302.

Nor, against tenant in tail after possibility. Co. L. 54. 2 Inst. 302.

Nor, against lessee at will. 5 Co. 13. b. Cro. EL. 777. 784.

So, wast does not lie against tenant for life or years without impeachment of wast.

So, if tenant for life, without impeachment, leases for years, wast does not lie against the lessee for years; for his estate is derived from him, who was dispunishable. R. Jon. 51.

So, if a lease for life or years be without impeachment of wast for two years, wast does not lie after the two years expired for wast during those years. Mo. 18.

### (D 1.) Wast, what shall be.

Wast, destruction, and exile of villeins, are all prohibited. Co. L. 53. b.

So, wast contains also exile; for though the st. of Marl. 23. speaks of wast, sale, and exile; yet the st. of M. c. 4. W. 2. 14. and the st. of Glo. 5. mention only wast and destruction, and exile is comprehended under the general word wast. Co. L. 53. b.

Wast is voluntary, or actual wast, and permissive wast. Co. L. 53. a.

### (D 2.) In houses.

By the st. Marl. 23. and st. Glo. 5. it appears that wast may be done in houses.

And therefore, if the lessee, &c. pull down the houses demised, it will be wast. Co. L. 53. a.

So, if he suffers a house to be uncovered, whereby the timber decays. Co. L. 53. a.

Though the timber be not thereby thrown down. 2 Rol. 815. l. 31.

So, if the house was uncovered at the commencement of the lease; yet it will be wast, if the lessee pulls it down. Co. L. 53. a.

Or, if it was ruinous at the commencement, and he suffers it to be more ruinous. 2 Rol. 818. l. 2.

So, if the lessee suffers *statuuncula ante ostium* to be uncovered whereby the timber thereof becomes rotten, it will be wast. R. 2 Rol. 814. l. 25.

Or, glass windows to be broke, or carried away. Co. L. 53. a. R. 4 Co. 63. b.

Or, the wainscot, benches, doors, furnaces, &c. fixed to the house. Co. L. 53. a.

Though they are fixed by the lessee himself by nails, screws, or otherwise. R. 4 Co. 64. a. R. Mo. 177. Cont. per Dod. 1 Rol. 216.

So, if he permits the walls of a house to be decayed for want of plastering, whereby the timber is rotted. R. 2 Rol. 816. l. 50.

Or, the chambers of the house. R. 2 Rol. 816. l. 45.

Though

Though the timber be not thereby rotted. *Semb.* 2 *Rol.* 817. l. 1.

So, if he does not scour a mote, &c. whereby the groundsel. &c. is decayed. *R. Ow.* 43.

So, it will be wast, if the walls are suffered to be decayed, though the timber was in decay at the commencement of the lease. 2 *Rol.* 817. l. 53.

If he suffers the house to be burned by neglect or mischance. *Co. L.* 53. b. 2 *Rol.* 820. l. 42.

So, it will be wast, though there be no timber upon the land demised for repairs. *Co. L.* 53. a.

Though the house was uncovered, &c. by tempest, if it be suffered afterwards to remain in decay. *Co. L.* 53. a. Per two *J. Mo.* 62. 2 *Rol.* 818. l. 2.

So, it will be wast, if the lessee pulls down the house, and rebuilds it less than before. 2 *Rol.* 815. l. 33.

So, if he rebuilds it larger to the prejudice of the lessor; for it is more charge to repair. 2 *Rol.* 815. l. 35.

So, if the lessee builds a new house, where there was none before. *Co. L.* 53. a. Per two *J.* 2 *Rol.* 815. l. 45. Cont. per *Wood, Kel.* 38.; for it will be for the lessor's profit, and if not, he may throw it down. *D. cont. Hob.* 234.

So, if he alters the house to the lessor's prejudice; as, if he converts a parlour into a stable. Per *Vavasor, Kel.* 39. 2 *Rol.* 815. l. 31.

Or, changes a corn mill to a fulling mill. Per two *J.* 2 *Rol.* 814. l. 46. *D.* 2 *Cro.* 182.

Or, to a horse mill, though it be for the lessor's advantage. 2 *Cro.* 182.

If he turns two rooms into one; for it would be for the lessor's advantage, it may be shewn on the other side. *R. Kel.* 38. 2 *Rol.* 815. l. 37.

So, if he converts a brewhouse of 120*l.* per annum into tenements of 200*l.* per annum. *R.* 1 *Lev.* 309. 311. 1 *Mod.* 94.

So, if he builds a new house, and afterwards suffers that to be decayed. *Adm.* 42 *Ed.* 3. 21. b. *Co. L.* 53. a.

But if the house was uncovered at the commencement of the lease, it is no wast, if the lessee suffers it to be decayed without pulling down. *Co. L.* 53. a. *R. Ow.* 93.

Or, if the walls were uncovered. *Co. L.* 53. a.

Or, if the house was ruinous, and the lessee suffers it to be as it was, if it is not more ruinous.

So, it is no wast, if the lessee removes furnaces, coppers, or other utensils of trade, though fixed to the freehold during his term. 1 *Sal.* 368. *Semb.* 21 *H.* 7. 27. a. *R.* 20 *H.* 7. 13. b.

But if it continues till the end of the term, he cannot remove it; for it is given to the reversioner. 1 *Sal.* 368. 21 *H.* 7. 27. a. 20 *H.* 7. 13. b.

[He may remove them after the expiration of the term without being guilty of a trespass for the removal, though he is guilty of a trespass for the entering, &c. 2 *East*, 88.]

[Erections made by a tenant for the better occupation of his farm are not removable by him. 3 *East*, 38.]

[There is a difference in this respect between annexations to the freehold for the purposes of trade, and those for the purposes of agriculture, the former being removable, the latter not. *Ibid.*]

(D 3.) In

## (D 3.) In gardens, &amp;c.

So, wast may be committed in a garden or orchard, though orchard is not named in the statute. 2 Rol. 817. l. 53.

As, if lessee cuts down pear trees, apple trees, or other fruit trees. Co. L. 53. 2 Rol. 817. l. 30.

Or, if they are thrown down by tempest, and the lessee afterwards roots them up, or cuts down the germens growing, without planting new. 2 Rol. 817. l. 85.

So, if the lessee destroys, or suffers the stock of a dovecote, warren, park, fish-pond, pool, &c. to be diminished. Co. L. 53. a. R. 4 Leo. 220. 2 Inst. 304. R. 2 Leo. 222.

Or, throws down the pales of a park or warren. Ow. 66.

Or, stops up the holes of a dovecote. Ibid.

Or, throws down the banks, &c. of a fish-pond, lake, &c. Ow. 67.

But if the lessee destroys, &c. it is no wast, if he leaves a sufficient stock. 2 Leo, 222.

## (D 4.) In land, meadow, &amp;c.

So, it will be wast, if the lessee suffers the sea to surround arable land, meadow, or pasture. 2 Rol. 816. l. 40. if it is by his default. Mo. 62. 73.

Or, if he suffers a wall or bank against the sea, a river, &c. to be ruinous, by which the water surrounds a meadow, &c. and renders it useless. Co. L. 53. b. Mo. 69.

So, if he digs up the surface of the land, and carries it away. R. 2 Rol. 816. l. 15.

If the lessee converts arable to wood, or *éconché*, it will be wast. Co. L. 53. b.

Or, meadow to arable. Co. L. 53. b. Mo. 101. 2 Rol. 815. l. 4. 814. l. 50.

Or, pasture. 2 Rol. 814. l. 50. 1 Ch. Rep. 106. 116.

Or, meadow to orchard, hop-garden; though it be melioration. 2 Leo. 174.

Or, converts a hop-garden to tillage. Ow. 67.

If lessee for life or years opens new mines in land demised, without mention of mines, it will be wast. Co. L. 53. b. R. 3 Co. 12. R. 2 Mod. 193.

So, if he digs for gravel, lime, clay, brick, earth, stone, &c. in pits not open. Co. L. 53. b. Mo. 101.

But it is not wast, if land, &c. is surrounded by the violence of a tempest.

So, if pasture be converted to tillage for improvement of the soil. 2 Rol. 814. l. 47.

Or, where it was sometimes pasture, and sometimes arable. Ibid.

Or, if it was stocked with conies, it not being a warren by charter or prescription. R. 2 Rol. 815. l. 15. 816. l. 15.

So, if it was a warren. R. Ow. 66. Vide ante, (D 3.)

So, it is no wast, if the land lies fallow, by which means it is over-run with bushes, &c. though it is bad husbandry. 2 Rol. 814. l. 35.

If trenches are dug in a meadow, to draw off the water. R. 2 Rol. 820. l. 23. 2 Leo. 174.

If wood be sown against the end of the term, though it is not ripe for many years. Semb. 2 Rol. 815. l. 50.

So, it is not wast to dig for metal, coal, &c. in mines open at the time of the lease. Co. L. 53. b. R. 5 Co. 12.

Or, if mines were not demised, if the land was demised with all mines. R. 5 Co. 12.

It will not be wast for a parson, vicar, &c. to dig or open mines in his glebe. Semb. 1 Sid. 152.

(D 5.) In wood, &c.

So, it is wast, if a lessee cuts down timber. Co. L. 53. a.

Oak, ash, and elm, are timber, after the age of twenty years, throughout the realm. Co. L. 53. a. Dy. 65. a.

And where they are scarce, by the custom of the country, beech, willow, hornbeam, &c. may be accounted timber. Co. L. 53. a. R. Mo. 812.

And therefore if a lessee cuts down trees, which by law or the usage of the country, are esteemed timber, it will be wast. Co. L. 53. a.

So, if it be found that he cut down black-thorn, *existent. arbores maheremiales*, it will be wast. R. 2 Rol. 819. l. 52. Cro. Car. 531.

So, if he cuts down white-thorn, where it is in a large quantity, or made wood. 2 Rol. 817. l. 12. 2 Cro. 126.

So, if a lessee cuts down young oaks, &c. being of twenty years growth, it will be wast. 2 Rol. 817. l. 28. 819. l. 45.

Or, destroys the germins. Co. L. 53. a.

So, if a lessee does an act by which the timber decays; as, if he tops and tops them. Dy. 65. a. Co. L. 53. a.

So, if a lessee cuts down birch, willow, maple, &c. which are not timber, if growing in defence of the house. Co. L. 53. a.

Or, upon the scite of the house. D. Hob. 219.

So, if he roots up or destroys quickset or white-thorn, &c. Co. L. 53. a. R. 2 Cro. 126.

If he extirpates or destroys the germins of underwood, which may be cut. Co. L. 53. a.

So, it will be wast, if a lessee cuts down trees for fuel, when there is *lignum aridum* sufficient. Co. L. 53. b. 2 Rol. 820. l. 10.

If he cuts down for new pales, fences, &c. where none were before. Co. L. 53. b.

Or, for a new house. 2 Rol. 822. l. 35.

If he sells the trees, and with the money repairs. Co. L. 53. b.

Or, afterwards re-purchases, and uses for repairs. Co. L. 53. b. 2 Rol. 823. l. 15.

If he cuts down for repairs which are not necessary. 2 Rol. 822. l. 40.

Or, for repairs, when there shall be occasion. R. Cro. El. 593.

Or, for repairs which happened by the lessee's own default. Co. L. 53. b. 2 Rol. 822. l. 38.

If he cuts down for the use of mines, though the lease was with all mines; for he can take only for things directly necessary. R. 2 Rol. 823. l. 30. Hutt. 19. Hob. 234.

Though the mines were open at the time of the lease, and the lesser and former lessees used to take timber for such use; for the lesser may

may do as he pleases, and the tort of the former lessee is no excuse. Per Hob. 235.

But cutting down trees which are not timber, nor stand for defence of the house, is not wast. Co. L. 53. a.

Nor, trees that were timber, when they are dead, *nec fractum nec folia portan*. Co. L. 53. a. 2 Rol. 814. l. 17.

So, cutting the underwood of oak, ash, willow, &c. is no wast. Per two J. 2 Rol. 817. l. 17. 20.

Though it be above twenty years since the last fall. Semb. 1 Sid. 300.

So, the cutting down bushes, white-thorn, &c. is no wast. R. 2 Cro. 126.

So, cutting down timber for necessary botes, allowed by law to the lessee, is no wast; as, for fuel, plough-bote, hedge-bote, &c. Co. L. 53. b.

Or, for repairs. Ibid.

For repair of pales, gates, fences, &c. Ibid.

Though the lessee covenants to repair at his own charge; for this does not take away the liberty which the law allows. R. Mo. 23.

So, though the lessor covenants to repair. Co. L. 54. b.

So, if the lease be without impeachment of wast; yet the lessee may cut down trees for repair, if he pleases. Co. L. 54. b.

So, if the house was ruinous at the entry of the lessee, in which case he will not be liable to wast, if it happens. Co. L. 54. b. 2 Rol. 823. l. 10.

Or, the decay was in the time of the ancestor of the plaintiff, who is now punishable. 2 Rol. 822. l. 45.

So, if it be for repair of things useful, though they are not absolutely necessary; as, for water-troughs to be fixed in the ground for his cattle. 2 Rol. 823. l. 22.

### (E) What shall not be wast.

#### (E 1.) In respect of the value.

But the lessee shall not be sued for wast, if the value does not amount to 40*d*. Co. L. 54. a. Noy, 4.

[Whether the wast consist in alteration or deterioration. 2 B. & P. 86.]

If it does not amount to more than 40*s*. Wynch, 5.

And therefore, if wast is found only to the value of 3*s*. or less, no judgment shall be given. 2 Rol. 824. l. 10. 15. 25. Noy, 4.

Though the defendant confesses the wast. Noy, 4. Wynch, 5.

And if judgment is given, it will be error. Per And. Noy, 4.

Yet where the value was to 40*d*. it has been allowed for wast. Co. L. 54. a. Noy, 4.

And several particulars may be united to make such value. Co. L. 54. a. 2 Rol. 824. l. 20.

[If the wast is under the limited value, the defendant is entitled to judgment. R. 2 Bos. 86.]

[In waste for converting three closes of meadow into garden ground, the jury gave a farthing damages for each close, and the court allowed the judgment to be entered for defendant. 2 Bos. 86. P. C.]

(E 2.) If

(E 2.) If the place be not demised.

So, wast does not lie, if the place, in which, is no part of the demise; as, if the lessor demises, except the woods, and afterwards the lessee cuts down the woods; for the soil is excepted. Per two J. Dy. 19. a. Adm. Cro. El. 690. [8 East, 190.]

But if there be a proviso, that it shall be lawful for the lessor to cut down trees, wast lies, if the lessee cuts down; for it is a covenant, and not an exception. R. Cro. El. 690. Dy. 19. a. in marg.

But if a lessee assigns his estate to A., except the woods, and A. cuts down, wast lies against him; for, as to the lessor, they are parcel of the demise. 2 Inst. 302. Dub. Cro. El. 17. R. Cro. El. 683. 1 Leo. 49.

So, if he assigns, except the mines, and afterwards digs; for the exception is void. R. Cro. El. 683.

(E 3.) Or, demised without impeachment.

So, it does not lie, if the lease be without impeachment of wast. Mo. 327.

*Sine impedimento vel impeditone vasti*, is tantamount to *sine impetitione*. 2 Inst. 146. 2 Rol. 835. l. 10. Co. Ent. 604. b. 2 Cro. 216.

But to be without impeachment is a privilege annexed to the estate, and if the estate is changed by confirmation, or otherwise, it is gone. 1 Rol. 183.

But a grant to a lessee, without impeachment of wast, is not good, if it is not by deed. 2 Inst. 146.

If it be not by the same deed by which he leases; for by another deed, it amounts to a covenant. 1 Rol. 183.

So, if a tenant in tail grants that the lessee shall be without impeachment, it does not bind his issue, though he accepts the rent. Ibid.

So, a lease, with all trees, timber, sales of wood, &c. is not without impeachment. R. Hob. 234.

So, a grant, that the lessee *commodum faciet meliori modo quo sibi videbitur*, &c. does not amount to without impeachment. Hob. 159.

(E 4.) If done by default in the lessor.

So, it does not lie, if the waste be done or occasioned by the lessor himself; as, if trees are cut, &c. by the lessor, or his command. 2 Rol. 822. l. 12.

If the lessor cuts down, &c. quickset or other fence, by which cattle escape into a wood demised, and destroy the germins there. R. 2 Rol. 822. l. 5.

If the lessor cuts down trees, and afterwards the lessee's cattle destroy the germins of them. Per two J. Mo. 9.

If the lessor does not allow gross timber, when there is not sufficient upon the land, and the decay is not by default of the lessee. Semb. per two J. Mo. 7.

So, it does not lie, if the lessor accepts a surrender from the lessee, after the wast. 2 Inst. 304.

## (E 5.) Or, by tempest or enemies.

So, it does not lie, if the wast was by tempest, lightning, &c. if it be repaired in convenient time. Co. L. 53. a. 10 Co. 139. b.

Or, by the king's enemies. Co. L. 53. a. 2 Inst. 303.

## (F) Penalty for wast.

## (F 1.) Done by guardian in chivalry.

By the st. M. Ch. 9 H. 3. 4. *custos terræ, &c. capiat nisi exit., &c. et hoc sine destructione est vasto hominum et rerum. commiserimus custodiam, &c. Nos ab eo capiemus emendas, & detrimus, &c. Custodiam et ille destructionem facerit aut vestram custodiam, &c.* And this was confirmed by the st. W.

And therefore, if a guardian in chivalry had committed waste he did not claim by the king's grant or commission, yet he his custody. Vide st. W. 1. 21. Co. L. 53.

If the king had the wardship, and committed or granted it the king might take amends for the heir. 2 Inst. 13.

If the king had not taken amends, an action for wast lay 1 2 Inst. 13.

If the heir, in ward, had brought an action within age, th lost his custody. Go. L. 54. a.

If at full age, he recovered damages only. Ibid.

And by the st. Glo. 5. he should recover treble damages; statute treble damages are annexed to the action for wast.

306.

So, the guardian shall now lose the custody, and treble wast, and shall be fined to the king. 2 Inst. 300.

But the guardian shall lose the custody of the land only, body. 2 Inst. 14.

And by the st. Glo. 5. the heir shall recover damages only; wardship is not sufficient for the value of the wast. 2 Inst.

## (F 2.) Done by tenant by curtesy, dower, for life years.

By the st. Marl. 52 H. 3. 23. *firmarii, &c. vastum, vendi exitium non facient, &c. Quod si fecerint et super hoc co dampna plena restituant, et per misericordiam graviter punia*

By the st. Glo. 6 Ed. 1. 5. lose the thing wasted, and ma of treble the value at which the wast shall be taxed.

And, therefore where, by the common law, tenant by cur dower answered only for the value of the wast, and had a cust to him to prevent wast being afterwards done. 2 Inst. 306.

Since the st. of Glo. as well tenant by curtesy and in dowe for life or years, shall lose *locum vastatum*, and treble damag

If wast be done *sparsim* in several parts of a house, the shall be forfeited. 2 Inst. 303. Co. L. 54. a.

So, if it be *sparsim* in the whole wood; for otherwise the and the residue of the wood, would be enjoyed by the lessor and the, which would occasion mutual trespasses by one upon the other. 2 Inst.

304.

So,

So, if a meadow be converted to tillage *sparsim*, through the whole Inst. 304.

So, if wast be assigned in the hall of a house, the whole house shall be forfeited; for it is the principal part of the house, and it cannot be divided from the house. Cont. Co. l. 54. a. Acc. per Noy. Dy. 2. b. in marg.

So, if wast be in the kitchen, &c. of a castle; for the castle cannot be divided. Dy. 272. b. in marg.

So, the lessor may waive wast against the lessee, and maintain *trover* against him who took trees cut down during the term. R. per three J. v. cont. Cro. Car. 242.

But if the place, in which the wast was committed, may be conveniently divided from the residue, that only shall be recovered; as, if a part of a wood, where the wast was, may be separated from the rest. 2 Inst. 304. Co. L. 54. a.

So, if wast be assigned in throwing down, &c. the pales of a park. If it does not appear that there were deer there, or that they were preserved, the plaintiff shall recover only so much of the place as where the pales were standing. R. 2 Rol. 836. l. 10.

So, if wast is assigned in three acres, and found only in one, the plaintiff shall recover but one, though the defendant pleads a plea which amounts to a forfeiture of the whole; as, if he claims the fee. 2 Inst. 5.

If wast be brought in the *tenet*, the plaintiff, generally, shall recover *damnum vastatum*, and treble damages. 2 Inst. 304.

If parceners lease to A. who commits wast, one parcener has issue and dies, A. commits fresh wast, in an action for both wasts, by the aunt and niece, they shall have judgment for the place wasted, and treble damages for the last wast, and the aunt shall have a separate judgment for treble damages for the first wast. 2 Inst. 305.

But if wast be brought in the *tenuit*, (as where the estate of the lessee determined by effluxion of time, or the act of God, or *tort* of the tenant; as by forfeiture, &c.) the plaintiff shall recover damages only. Inst. 304.

So, if the lessee's estate determines *pendente lite*; for the action does not abate. 2 Inst. 304.

If a lease be to A. for life, remainder to a woman for years, and they marry, if the reversioner brings wast against them, he shall recover the estates. 2 Leo. 7.

As to process, count, pleas, view and judgment in wast, vide in Pleas, (3 O 1, &c.)

### [(F 3.) Action in the nature of waste.]

[Permissive waste is not a subject for the action. 1 N. R. 290. Taunt. 764. 7 Taunt. 392. 1 B. Moore, 100.]

[It lies against tenant for years after the expiration of his term. Blk. 111.]

Vide more concerning Wast, in Chancery (D 11.—4 N).—Chase, 41, &c.)—Copyhold, (M 3).—Pleader, (3 O 1, &c.)—Prohibition, (F 16.)

And see also of the nature of the action in the case of a freehold.

**WAY.**

Vide CHIMIN.

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**WEIGHTS AND MEASURES.**

Vide JUSTICES OF PEACE, (B 31. 90. &c. LEET, (L 6, &c.) MONEY,  
(B 1.)

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**[WEST INDIA DOCKS.]**

[The standard of compensation under the dock act, is the yearly profits made before the act. 9 East, 165.]

[The charges to which the company are liable in consideration of the 6s. 8d. per ton, are ordinary charges only. 12 East, 518.]

[Those goods only which are intended for present use, are exempt from charges under s. 137. 10 East, 533.]

[The delivery of property to the owners under s. 137. must be such as will enable them to carry them by water or land, as they choose. 8 East, 16.]

[As to the transfer and indorsement of dock warrants, see 7 Taunt. 265. 1 Moore, 12. 7 Taunt. 278. 1 Moore, 29.]

[The treasurer is entitled to fourteen days' notice of action under sect. 185. 5 East, 115. 1 Smith, 346.]

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**[WHALE FISHERY.]**

[The customs of the fisheries are binding upon those frequenting the fisheries. 1 Taunt. 241.]

[In the northern sea fishery, the striker's right only continues whilst (but then exclusively) he retains dominion. 1 Taunt. 243.]

[In the southern seas, and touching the premiums under 28 G. 3. c. 20. the fourteen months are computed from clearing out; and by lunar months. 6 T. R. 224.]

[In the fisheries of the Gallipos islands, the striker with a droug is entitled to share a moiety with the killer. 1 Taunt. 241.]

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**[WHARF AND WHARFINGER.]**

[Wharfs must be in open places. 1 Blk. 581.]

[In pleading a wharf, its original need not be shewn. 8 T. R. 606.]

[The lien of a wharfinger is general upon all goods. 3 B & P. 119.]

[But does not for a general balance extend to goods transferred to another after order and before receipt. *ibid.*]

**[WINE.]**

**[WINE.]**

[To state in an information on 24 G. 3. c. 47. s. 1. that the wine is liable to forfeiture, upon being imported in casks of less than twenty five gallons, without specifically negating the exceptions in 1 Geo. 2. c. 17. is good after verdict. And the crown need not prove the quality of the wine. Forrest, 43.]

[Buying is dealing under 26 Geo. 3. c. 59. s. 4. 2 T. R. 381.]

[In a permit to be in force for one hour after, &c. and two days' more for being delivered into, &c.; the two days are computed at twenty-four hours each. 5 T. R. 255.]

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**WHIPPING.**

Vide TUMBREL, (C).

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**WIDOW.**

Vide DOWER.

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**WIGHT, ISLE OF.**

Vide NAVIGATION, (F 5.)

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**WIFE.**

Vide BARON AND FEME.—CAPACITY, (D 2.)

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**WINE AND WINE LICENCE.**

Vide JUSTICES OF PEACE, (B 100.)—LONDON, (K 5.)

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**WILL.**

Vide CHANCERY, (3 A 1, &c.—3 Y 1, &c.)—CONDITION, (A 4.)—  
DEVISE.

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**WITCHCRAFT.**

Vide JUSTICES, (S 13.)—JUSTICES OF PEACE, (B 13.)

**WITHERNAM.**

Vide PLEADER, (S K 1, &c.)

**WITNESS.**

Vide TESTMOIGNE.

**WOODS.**

Vide CHACE, (N 5, 6, 7.) DISES, (H 3, 4.)

**WOOD-STEALERS.**

Vide JUSTICES OF PEACE, (B 86.)

**WOODWARD.**

Vide CHACE, (Q 5.)

**WOOL.**

[The trial of informations relative to wool, must be in the county whence the jury come, 3 T. R. 611.]

[The notice of appeal from a conviction under 29 Geo. 3. c. 33. s. 7. need only be given to the prosecutor. 2 Smith, 241.]

[The 1 P. & M. c. 7, does not prohibit inhabitants of a market town, &c. from selling woollen cloth, &c. in other market towns, &c. by retail, and not in open fair. Dougl. 256.]

[The 13 G. 1. c. 23. s. 5. does not extend to a demand against clothiers, by the owner of a scribbling and carding mill, for work done in teasing, &c. wool. 1 M. & S. 624.]

[As to the 28 G. 3. c. 38. the words "so as the same may be reduced to and made use of as wool again," do not refer to each particular before enumerated, but are confined to "coverlids, waddings, and other manufactures." 3 T. R. 611.]

[And where the prosecution under it originates in an inferior court, judgment must be given there; where in a superior, the court in bank must pass sentence. Ibid.]

[The importation of cotton wool in ships navigated by foreign seamen, is not legalized by 43 G. 3. c. 153. 4 M. & S. 346.]

Vide DISES, (H 7.)

**WORDS.**

Vide PAROLS.

**WRECK.**

## WRECK.

## (A) Wreck, Flotsan, Jetsan ; what shall be.

Wreck is, where goods after shipwreck are thrown upon the land, and no man, dog, or other animal escapes alive out of the ship. 2 Inst. 166.

Flotsan is, where goods, after shipwreck, lie floating or swimming upon the top of the water. Bl. Nom. verb. Jetsan.

Jetsan is, any thing cast out of the ship, being in danger of a wreck, and beaten to the shore by the waves, or cast on it by the mariners. Bl. Nom. verb. Flotsan.

But if any animal escapes alive to land, it will not be a wreck ; for a dog and cat are only specified as examples. 2 Inst. 167.

[Property on board is not necessarily forfeited as a wreck, because no live animal escape. 5 Burr. 2732.]

So, the king's goods shall not be a wreck, if the property be proved at any time. 2 Inst. 168.

So, if a ship being in distress, all desert her, and any one come alive to land, though the ship afterwards perishes, there will be no wreck. 2 Inst. 167.

So, if a ship be pursued by enemies, and all the mariners, to save their lives, desert the ship and come to land, and the ship is ransacked by the enemies, and afterwards put to sea, and there perishes, it will be no wreck. Ibid.

So, if a ship, being in a tempest, cuts its cable, the anchor is not wreck. 2 Rol. 159.

By the st. W. 1. 3 Ed. 1. 4. (which is only a declaration of the common law) the things must be kept by view of the sheriff, coroner, king's bailiff, &c. and bailed in the hands of those of the town where found ; and if any one proves property within a year and a day, they shall be restored to him without delay ; if not, they remain to the king. Vau. 164.

And wreck belongs to a subject by grant or prescription. 2 Inst. 168.

In which case the sheriff, &c. must deliver the goods to the grantee. Ibid.

If the sheriff, &c. does not do it, he shall be imprisoned and fined at the king's will, and render damages. 2 Inst. 166. 168.

If the goods are not kept by the sheriff, but taken away by the neighbours, the owner shall have a commission of oyer and terminer to inquire of the trespass, and to make restitution. 2 Inst. 168.

But if the goods found are *bona peritura*, the sheriff may sell them within the year. 2 Inst. 168.

The year and day, within which the owner may prove his property, shall be computed from the seizure, as wreck. 2 Inst. 168.

And if the owner dies within that time, his executor or administrator may prove his property. 2 Inst. 168.

Goods, which are wreck, pay no customs. R. Vau. 161, &c.

[By st. 26 G. 2. c. 19. stealing from wreck, wounding any person wrecked, or obstructing his escape, or putting out false light, is felony without clergy.]

But for goods of small value cast on shore, and stolen without circumstances of cruelty, offender may be indicted and punished for petty larceny.

**WRECK.**

[Justice may issue search-warrant for wrecked goods; or goods offered to sale, supposed wrecked, may be stopped, and justice may commit offender for six months, or till payment of treble value.]

[Persons saving goods, and giving notice, of discovering concealed goods, entitled to salvage.]

[When a vessel is stranded, the nearest justice, &c. shall give notice for a meeting of sheriff, justices, &c. to give assistance, and adjust salvage.]

[If the salvage is not paid, officers of customs may sell goods to pay it.]

[On oath of plunder, theft, or breaking ship, made and delivered to clerk of peace, he shall prosecute, on pain of 100*l.*, the charges to be paid by treasurer of county.]

[Persons assaulting officers employed in salvage, shall be transported for seven years.]

[Persons employed shall act under the orders of master, owners, officer of customs, of excise, sheriff, justice, mayor, commissioner of land-tax, chief constable, petty constable, on pain of 5*l.* or three months commitment.]

[The ship's name, &c. shall be sent, on oath, to the secretary of the admiralty, and published in Gazette.]

Vide more concerning wreck, in Admiralty, (F 7.)—Officer, (G 10.)

**WRIT.**

Vide BRIEF.

**WRITING.**

Vide ACTION UPON THE CASE UPON ASSUMPSIT, (F 3.)—AGREEMENT, (B 4.)—ESTOPPEL, (A 2.)—EVIDENCE, (C 1.)—FAIT, (A 1.)

**WRONG.**

Vide PRESCRIPTION, (F 2.)—TRESPASS, (A 3.)

**[WYRLEY AND ELSINGTON CANAL ACT.]**

[As to its construction, see 7 East, 368.]

**YEAR.**

Vide ANN.

**YEAR AND DAY.**

Vide TEMPS, (B 1.)

**YEAR, DAY, AND WAST.**

Vide ANN, JOUR, ET WAST.

# ADDENDA

OF

## CASES

DECIDED AFTER THE RESPECTIVE TITLES WERE  
PRINTED.

### ABATEMENT BY DEATH.

THE 8 & 9 W. 3. c. 11. s. 7. applies to writs of error, and therefore a writ of error not abate by the death of one of several plaintiffs in error. 1 B. & A. 586. Of one of several plaintiffs.

### ABATEMENT, PLEAS IN.

1. Plea in abatement in proceedings by bill, concluding with a prayer of Judgment of the writ and declaration founded thereon. Form of.  
Held bad upon special demurrer. 1 B. & A. 172.

2. To a Bill filed in vacation, a plea in abatement may be put in after the first four days of the following term. 3 B. & A. 259. Time allowed for.

### ACTION.

1. An action at law is not maintainable upon a decree of a court of equity for a specific sum of money, founded on equitable consideration only, and therefore where a bill was filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase money and costs. Held, that no action at law was maintainable to recover such interest and costs. 3 B. & A. 52. Cause of.

2. A trespasser having knowledge that there are spring guns in a wood, although he be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off. 3 B. & A. 304.

3. The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care; therefore, where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl presenting the gun at him and drawing the trigger, when the gun went off. Held, that the defendant was liable to damages in an action upon the case. 5 M. & S. 198.

4. If the interest of covenantees by several actions, although the language of the covenant be that of a joint covenant. 8 Taunt. 245. Parties to.

5. The

5. The criterion by which the property of the joinder or non-joinder of parties to a covenant in an action for breaches is to be ascertained, is the nature of the interest of the covenantees. If the interest be several, the action may be several, if joint, it must be joint, and the terms or language of the covenant do not controul that principle. 5 Price, 529.

Form of.

originals.

6. A count stating that defendant was indebted to plaintiff for work and labour, and being indebted, that he undertook and promised to pay, &c., whereby an action hath accrued, &c. is not a good count in debt, and cannot be joined in a declaration with counts in debt. 3 B. & A. 208.

### ADULTERY, ACTION FOR.

Evidence in.

In an action for adultery, letters written by the wife to the husband while living apart from each other, proved to have been written at the time they bore date, and when there was no reason to suspect collusion, are admissible evidence without showing distinctly the cause of their living apart. 1 B. & A. 90.

### AFFIDAVIT.

Before whom sworn.

When made.

Form of.

Before a commissioner.

In reply on a rule to show cause.

1. The court will discharge with costs a rule obtained on affidavit of a party, which are sworn before his own attorney in the cause. 8 Taunt. 74.

2. If the court open a rule made absolute on the usual affidavit of service, to give an opportunity of showing cause, they will not hear affidavits sworn after the day on which the rule had been made absolute. 5 Price, 384.

3. If affidavits run to a very impertinent and unnecessary length, the court will make the party filing them pay a proportionate part of the costs. 7 Price, 594.

4. An affidavit of justification of bail, in the jurat of which it was stated to have been "sworn at *Beverley*," (omitting the county) rejected. 7 Price, 662.

5. The court on a rule to show cause will not hear affidavits in reply. 7 Price, 709.

### AMENDMENT.

In the process.

On demurrer.

1. A writ returnable on a *dies non* is altogether void, and cannot be amended by the court. 4 B. & A. 288.

2. And *semble*, that an administrator *de bonis non* might claim on such promissory note against the *primæ facie* right of the personal representative of the administrator of the intestate. 5 Price, 412.

3. The court will not permit a defendant to withdraw and amend after a demurrer has been argued. 5 Price, 412.

### ANNUITY.

Whether a rent or an annuity.

By letters patent 24 Car. 2. the king granted to the use of A., his heirs and assigns for ever, an annuity of 1000*l.* to be paid out of his revenue

revenue of four and a half per cent. at *Barbadoes* and the *Leeward* islands. Held, that this annuity was personal and duly passed under a will, attested by two witnesses, by a residuary clause, bequeathing all the rest, residue and remainder of a testatrix personal estate of what nature or kind soever to her executors. 4 B. & A. 59.

### APOTHECARY.

Where a defendant was sued for a penalty under 55 Geo. 3. c. 194. s. 20., and contended that he was within the exception, as having prior to *August 1st*, 1815, actually practised as an apothecary. Held, that it was proper in summoning up to the jury, for the judge to refer to the 5th s. of the act, as describing the duty of an apothecary to be to make up the prescriptions of physicians; and it appearing that the defendant never had or could have done so prior to *August 1st*, 1815, that such total incapacity was cogent evidence to be left to the jury, and that they did right to find that he had never practised as an apothecary, although, in fact, he had on many occasions administered medicines to various patients prior to that period. 3 B. & A. 40.

Statutes relative to.

2. 3 B. & A. 40.

### APPRENTICESHIP.

1. Covenant upon an indenture of Apprenticeship, by the master against the further breach, that the apprentice absented himself from the service, plea that the son faithfully served till he came of age, and that he then avoided the indenture. Held, that this was no answer to the action. 3 B. & A. 59.

Relative to the avoidance of.

2. An apprentice bound for seven years to A., served him in his house between five and six years, and afterwards for the remainder of the term resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. a week to his master. The master also during this time occasionally gave him work, for which he was not paid. Held, that this was not a continuance of the service to A. for seven years under the indenture. 4 B. & A. 55.

With reference to charters.

### ARBITRATION.

1. Agreement for a lease for sixty-three years from the 1st of May, 1801, the lessee to be allowed three years from that time for winning the colliery without payment of any rent, an arbitrator, being authorized to give such direction for a lease according to the agreement as he should think fit, directed a lease for sixty-three years from the 1st of May, 1804. Held that he had exceeded his authority, and that the award was bad. 1 B. & B. 80.

Relative to the submission.

2. A. B. C. D. E. and F. partners in trade submitted to arbitration differences which had arisen between them in their trade, A. B. and C. gave a joint and several bond to D., E. and F. conditioned for the performance of an award, and D. E. and F. gave a similar bond to A. B. and C. The arbitrator awarded among other things, that A. should pay a sum of money to B., A. having sued B. on the award. Held, (Richardson J., dissentiente,) that A. might recover the sum awarded to him. 1 B. & B. 350.

3. The

3. The authority of an arbitrator is determined by the death of either party before the award. 2 B. & A. 394.

4. Where a case was referred by order of *nisi prius* and after the reference, but before the making of the award, the plaintiff became bankrupt. Held, that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant had done right. 4 B. & A. 250.

5. A judge's order directed that a cause should be referred, and that either party willfully preventing the arbitrator from making an award by affected delay or otherwise, should pay such costs as the court thought reasonable and just. Held, that such order might be made a rule of court after one of the parties had revoked the authority of the arbitrator. 2 B. & A. 395. But secondly, where the authority was revoked, because the party could not procure the attendance of material witnesses before the arbitrator, the court refused to allow any costs. *Ibid.*

Relative to the  
award.

6. By rule of court, a cause and all matters in difference were referred to an arbitrator, and the costs of the cause were to abide the event. The arbitrator directed the verdict to be entered for the plaintiffs, but that they should not take out execution for the debt until they had paid a larger sum due to the defendant. Held, that the Plaintiff's attorney might still take out execution for the costs. 2 B. & A. 597.

7. After issue joined, and notice of trial given, a cause was referred. It appeared doubtful on affidavits, whether the award was made previous or subsequent to a revocation of the submission. The court refused to stay proceedings, but left the defendant to plead the award. 8 Taunt. 146.

8. Upon the trial of an action of *tort*, a verdict was found for the plaintiff, subject to a reference of all matters in difference, the defendant claims before the arbitrator a sum of money due to him, upon the balance of an account which was admitted by the plaintiff to be due. The award without stating that it was made of and concerning the premises, directed a verdict to be entered for the plaintiff with damages. Held, that his award was sufficient. 1 B. & A. 106.

9. Where it is stipulated that in case of the breach of an agreement the sum of 100*l.* should be received as a stipulated debt, binding on each party, as to the amount, and an action for damages generally, for the breach of this agreement was referred to an arbitrator, who awarded only 10*l.* damages. Held, that in order to entitle the party to come to set aside this award, it was necessary expressly to state in the affidavit, that this clause was pointed out to the arbitrator at the time, and that he was required to act upon it. 2 B. & A. 704.

10. A special jury having been obtained on the motion of the defendant, the cause was referred, and by the order of reference the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator. Held, that the arbitrator cannot, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury. 1 B. & A. 663.

11. The court will not set aside an award on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject, and therefore where the captain of a ship at an intermediate port, in order to pay for repairs, had necessarily sold part

part of the cargo at a price higher than it would have fetched at the port of destination, and upon a reference to settle the average laws between the ship owner and charterers, the arbitrators (who were mercantile men) allowed for the actual value of the goods when sold, and not for the price they would have fetched at the port of destination, the court refused to set aside the award. 3 B. & A. 237.

12. The court requires strong facts, and to be distinctly stated in cases of setting aside an award and a denial of any such, is conclusive. 4 Price, 232.

13. All the witnesses of the party against whom the award is made must have been examined, and in his presence, or it will be a ground for setting the award aside, but that must be made clearly to appear. 4 Price, 232.

14. Where the defendants in an extent in aid, have withdrawn their plea, and suffered judgment to be entered up, upon an agreement to submit to arbitration, the question of the amount of what is due to the prosecutor, provided the award be made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendants having delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendant's solicitor afterwards wrote a letter requiring that the arbitrator would take into consideration matters not before him during the reference which was refused, as the reference was considered to be closed. It was held by the court, that under those circumstances, the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; for that the conduct of the defendants, and the solicitor's letter, was equivalent to a consent to extend the time; and therefore they refused to set aside the judgment and the proceedings thereon, and the award, and allow the defendants to plead to the extent. 7 Price, 636. Relative to the arbitrator.

15. An arbitrator is not bound by a rule of practice adopted by courts of law for general convenience, and therefore when a reference of a chancery suit, and all matters in difference between the parties, the arbitrators had allowed interest (when it would not be allowed by a court of law or equity), the court refused to set aside the award on that ground. 2 B. & A. 691.

16. Submission to the arbitrament of two, and, in case they disagreed, to the umpirage of a third, so that the arbitrators made their award on or before a day certain, and the umpire, if they should differ, before a subsequent day, and the umpire made his award before the time given to arbitrators expired. Held, that the umpirage need not state that the arbitrators had disagreed. 5 M. & S. 193. Relative umpire.

17. Where the parties named two arbitrators who were to choose an umpire, and each arbitrator named a person to whom the other objected, and they afterwards agreed to decide by lot which should name the umpire, and thereupon the party who won named the person to whom the other had previously objected. Held, that the award made by such umpire was bad. 2 B. & A. 218.

## ARMY.

Soldiers.

The examination of a soldier taken under the mutiny act, is to be received as evidence as to his settlement, even though he be dead, or absent from the kingdom at the time when the appeal is tried. 3 B. & A. 121.

## ARREST.

Exemption from, in civil cases.

1. Where the question of privilege from arrest is doubtful, the court will not, upon motion, discharge the party out of custody, but leave him to his writ of privilege. 2 B. & A. 234.

2. *Quære*, whether a gentleman of the king's privy chamber be privileged from arrest. 2 B. & A. 234.

3. Where a party in *London* was required to attend an arbitrator at *Exeter*, on a given day, and three days before set off, and went, accompanied by his attorney, to *Clifton*, where his wife resided, and where were certain papers necessary to be produced before the arbitrator, and was occupied for a great part of two days in selecting and arranging the same, and in the afternoon of the second day was arrested. Held, that he was not privileged from arrest under these circumstances, having employed more than a reasonable time for the above purpose, and it not being sworn that he was occupied during all the time he was at *Clifton*, in the object for which he went thither. Abbott, C. J. dissentiente. 3 B. & A. 252.

4. G. being a party in a suit referred to arbitration, having been also required to attend at *Exeter*, as a witness before the arbitrator, and to bring with him certain papers in his possession, to be read on the reference, which was appointed for the 20th of *September*, left *London* on the 16th, for the purpose of going thither, and pursued his journey by way of *Clifton*, in order to procure the necessary papers which had been left there, during a previous visit, in custody of his wife, who had continued and was still remaining there; and arriving on the 17th, employed himself in assorting his papers and selecting such as were necessary to take with him, which occupied him and the professional person whom he had procured to accompany him, to assist in so doing, all that day and the next, and at 5 o'clock of the latter day; and whilst he was so busied, he was arrested at the suit of a creditor. Held, that he was privileged during the journey, including his stay at *Clifton*, on the ground of the deviation being for a necessary purpose, and the delay no more than reasonable for the accomplishment of it, according to the facts stated to the court by the affidavits. Garrow, Baron, dissentiente; absent Richards, Lord Chief Baron. 7 Price, 699.

On suspicion of felony.

5. A person of decent repute, while attending a fair, at a town in which he was a stranger, in the way of his business as a horse-dealer, having knowingly uttered a forged note, for which he is afterwards apprehended by private persons without warrant, on his way home, and carried before a magistrate for examination, by whom he is immediately discharged; cannot maintain an action for false imprisonment against those who so apprehended him under such circumstances, and those circumstances may be pleaded in justification, and if proved, will entitle the defendant to a verdict; at least, the court will not grant a new trial where the jury have been so directed, although

although the defendant had also pleaded the general issue. 5 Price, 525.

6. The sheriff having, within a liberty where particular officers had the exclusive privilege of executing all process, arrested a defendant upon a *ca. sa.*, in which there was not any *non omittas* clause, suffered him to go at large before his removal from the liberty. Held, that he was liable in an action for an escape. 3 B. & A. 502. Unlawful. 616b2

## ASSUMPSIT.

1. The defendant contracted to transfer stock on a certain day to the plaintiff, but failed to perform his contract, upon which the plaintiff bought the stock; and, to recover the consequent loss sustained by him, brought an action against the defendant for money paid. Held, that such action was not maintainable, as the plaintiff should have declared specially on the contract. 8 Taunt. 268. General and special. 616b3

2. Declaration in assumpsit, charging, that defendant was indebted to the plaintiff in 500 quarts of wheat for tolls, without stating any value, is bad upon special demurrer. 4 B. & A. 268. Pleadings.

3. In assumpsit by the provisional assignee of a bankrupt, defendant pleaded the general issue. Held, that the fact of the bankrupt's estate having been assigned by the provisional assignee, to the new assignees, between the time of issuing the *latitat* and the delivery of the declaration, is no ground of nonsuit upon a plea of *non assumpsit*. 4 B. & A. 345.

## ATTACHMENT.

1. The defendant having been served with common process, colored and violently shook the officer, and ordered him to quit his presence. Held, that without disclosing more of the circumstances, this did not necessarily amount to a contempt of the court and obstruction of its process, for which they would grant an attachment. 1 B. & B. 24. In what cases grantable.

2. The court refused to make a rule for an attachment absolute against A. for the non-production of indentures according to their order, on his swearing that he could not comply with the order, not having the indentures in his possession, that he had never destroyed them, and that he had made diligent search for them, and repeatedly enquired for them, but could find no trace of them. 8 Taunt. 150. Motion for.

## ATTORNEY.

1. An attorney had sent the money regularly for his certificates for three years, by his clerk, who misapplied the money, and failed to purchase them. The court, upon application for his re-admission as an attorney, granted a rule absolute, in the first instance, conditioned for the production of the Attorney General's consent. 8 Taunt. 180. Admission of.

2. An attorney who has continued to practise as a solicitor, after his certificate had expired, may, under circumstances, be readmitted, without giving a month's notice. 3 B. & A. 160. 3. An

3. An agent employed to take out an attorney's annual certificate, having neglected so to do, and the attorney having from ignorance of the fact, continued to practise, the court will only allow him to be re-admitted, upon payment of the arrears and a fine. 4 B. & A. 90.

4. An Attorney who had not practised on his own account since his last certificate expired, may be re-admitted without paying any fine or arrears of duty. 2 B. & A. 314.

**Privileges of.**

5. An attorney does not lose his privilege by neglecting to renew his certificate at the expiration of his former certificate, if he renew it within the space of one year. 5 M. & S. 281.

6. An attorney in custody for debt loses his privilege and may be detained upon *mesne* process. 4 B. & A. 88.

**Lien of.**

7. The plaintiff after judgment recovered settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record. Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. 4 B. & A. 466.

**Relative to his bill.**

8. The court cannot order a solicitor's bill of costs for business done wholly in the House of Lords in the prosecution of an appeal to be referred for taxation, because their officer has no means whereby he may be enabled to tax such a bill. 4 Price, 279.

9. A charge for preparing an affidavit of the petitioning creditors debt, and bond to the chancellor, in order to obtain a commission of bankruptcy, is not a taxable item in an attorney's bill within 2 G. 2. c. 23. s. 23. as being a charge at law or in equity, the affidavit not having been sworn nor a commission issued. 3 B. & A. 486.

10. The court will not stay the *postea* in the hands of the associate, for the purpose of having an attorney's bill, on which an action has been brought and a verdict recovered, referred for taxation, and to be indorsed according to the *allocatur*, where the jury expressly found a "verdict for the plaintiff for the amount of his bills subject to taxation." They discharged a rule which had been obtained to show cause why such an application should not be granted with costs. 7 Price, 234.

11. More than one-sixth part of an attorney's bill having been taken off on taxation, the defendant presented a petition to the vice chancellor to allow the costs of taxation; pending this proceeding, the attorney brought his action for the residue of the bill. Held, that the action was well brought, the statute 2 G. 2. c. 23. s. 23. having only prohibited an action being brought pending the reference and taxation. 2 B. & A. 745.

**Summary jurisdiction over.**

12. Where the employment of an attorney is so connected with his professional character as to afford a presumption that his employment was in consequence of that character, the court will interfere, in a summary way, to compel him faithfully to execute the trust reposed in him; and, therefore, where an attorney was employed by A. to collect and get in the effects due to him as administrator of another person, the court compelled the attorney to render an account to the executors of A. of the monies, &c. received by him, although he had never been employed by A. or his executors to conduct any suit in law or equity on his or their behalf. 4 B. & A. 47.

13. The court, in the exercise of its summary jurisdiction over its officers, have authority to order an attorney who had refused, on the ground of misconduct, to take back an apprentice who had run away from his service, to return to the parents of such apprentice a reasonable part of the premium received with him. 3 B. & A. 257.

14. Where

14. Where an attorney for the plaintiff suffered the case to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived; in consequence of which the plaintiff was nonsuited. Held, that in an action against him for negligence, it was properly left to the jury to say whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the court refused to disturb the verdict. 4 B. & A. 202. Liabilities of.

15. It is no objection in this court that bail is put in by a different clerk in court, without an order first obtained for leave to change the clerk in court, or notice given of the change to the plaintiff or his attorney. As to the change of the attorney (not being one of the four attorneys of this court,) *semble*, the court does not take notice of the immediate attorney in the cause, the proceedings being carried on in the exchequer wholly in the names of the clerks in court. 5 Price, 558. Relative to changing the attorney.

16. Notice of bail was given by the defendant's attorney, and bail above put in by an attorney employed by the bail to the sheriff, without any order having been made to change the attorney. Held, that this was sufficient. 2 B. & A. 604.

17. A warrant of attorney to confess judgment is not void for omitting to state in the defeazance a collateral security for the same debt. 2 B. & A. 568. Warrant of.

18. If A., under arrest at the suit of B., gives to C., the sheriff's officer, in whose custody he is, a warrant of attorney for a debt due to C., such warrant will be void, if no attorney be present at the execution of the part of A. 8 Taunt. 223.

19. In entering up judgment on an old warrant of attorney, the affidavit may be properly entitled in a cause. 1 B. & A. 567.

20. Where an attorney has been struck off the rolls of the K. B. on a report of the master, he will, on motion, be struck off the rolls of this court unless sufficient cause be shown to the contrary, 1 B. & B. 522. Of striking him off the roll.

### AUCTION.

A purchaser of an estate by public auction, deposited a sum with the auctioneer, as part of the purchase money, until the vendor made out a good title, according to the conditions of sale. No good title was made; but the treaty was kept open with the auctioneer for four years from the time of the sale, and no demand had been made on him for the repayment of the deposit. Held, that in such case the auctioneer is not liable to the purchaser for interest on the deposit money, 8 Taunton. 45. Auctioneer.

### BAIL IN CIVIL CASES.

1. Proceedings on a bail bond, set aside on the ground, that it was given in a second action for the same cause, though the first action was now prosequed. 1 B. & B. 514. Bail to the sheriff.

2. Where the defendant was arrested again, after a *non pros*, the court allowed the bail bond in the second action to be cancelled, the plaintiff not showing that the second arrest was not vexatious, 1 B. & B. 289.

3. On the dissolution of partnership, between B. and C.; C. filed his bill in equity against B., for an account; A. admitted that he owed a balance to the house of B. and C., and was made a defendant.

in the suit of equity. C. applied to the court of chancery for a writ of *ex parte regno* against A., for a much larger sum than that admitted, alledging that to be the balance due to the house of B. and C. The court granted the writ for the smaller sum only; and A. was accordingly held to bail for the smaller sum, which he paid into court. B. became bankrupt. The assignees of B. C. being one of them, attached A. for the larger sum. This court refused to discharge A. out of custody, on the ground that this case did not come within the principle *nemo debet bis venari pro eadem causa*, Taunt. 24.

4. A sheriff is not authorized, by the 23d. H. 6. c. 10. to let out of custody, on bail, a defendant taken under an attachment setting out of courts of law, for non payment of costs, because such a process is in the nature of, and in effect an execution, 4 Price, 23. Ifa for an action of debt, on such a bail bond, that it was given to the sheriff, under such circumstances, held good on general demurrer. Ibid.

5. A bailable writ, is not necessarily a special writ; within the 51. G. 3. c. 124.; and plea stating, that plaintiff commenced his action by a bailable writ indorsed, for bail for 60l., by virtue of which, defendant was arrested, and that plaintiff's then cause of action did not amount to 15l., or to any sum for which defendant was liable to be arrested, was held bad on general demurrer, for not showing the writ to be a special writ. 1 B. & A. 388.

6. Where plaintiff held defendant to bail, before the cause of action accrued, and afterwards discontinued and paid costs, and then arrested him *de novo* for the same cause after it accrued, the court discharged defendant on common bail. 5 M. & S. 98.

7. The defendant was arrested upon a *copias*, directed to the sheriffs of London, which issued upon an office copy of an affidavit of debt, sworn before the *Filacer* for Devon, no affidavit having being made before the *Filacer* for London. Held, that the proceedings were regular, and the defendant not entitled to his discharge. 8 Taunt. 242.

8. An affidavit to hold to bail, which states the defendant is indebted to plaintiff, as drawer of a bill of exchange, is not sufficient unless it is also stated that the bill is due. 3 B. & A. 495.

9. The court will not order a defendant, arrested in *trover*, to be discharged, on filing common bail, on a motion for that purpose, founded on an objection to the form of the affidavit on which the process issued, that it did not negative a tender, although the motion be made on an affidavit, stating that the value of the subject-matter of the action had been, in point of fact, actually tendered to the plaintiff before the writ was sued out. 4 Price, 306.

10. An affidavit to hold to bail, stating that the defendant was indebted to plaintiff, for goods sold, and delivered by the plaintiff, for the defendant, is insufficient, because it did not appear that the goods were sold and delivered to the defendant. 2 B. & A. 596.

11. The proceedings in an action, or the bail bond having been stayed, the defendant pleaded to the original action, the general issue and subsequently a plea of bankrupt, *puis darrein continuance*. There being no affidavit that the application to stay the proceedings was made on the part of the bail, the court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground that when the proceedings were stayed in the action on the bail bond, it was intended that the defendant should only question the validity of the original debt. 4 B. & A. 249.

12. The bail to the sheriff, are discharged by the defendants going a *recognit* for payment of debt and costs. 4 B. & A. 519.

13. Where an assignment of the bail bond is taken after bail is taken, the assignee has

have been put in, but not perfected, and the plaintiff's clerk in court, has consented to an order for staying proceedings on the bail bond, on payment of costs, he is not entitled to have the security of the bail bond, because he has waived the right which arises from having lost a trial by his own conduct. 7 Price, 585.

14. Bail having been put in and justified, the defendant pending the rule nisi, for setting aside the allowance of such bail was rendered, the rule nisi being afterwards made absolute, an assignment of the bail bond was taken. Held, that such assignment was regular; the reader under such circumstances being insufficient. 2 B. & A. 768.

15. Bail bond stands as a security, where a trial has been lost notwithstanding the bail have rendered the principal, 2 B. & A. 588.

16. The assignee of a bail bond, without any sufficient reason for so doing, brought separate actions against each of the bail; the court, upon payment of the costs of one action, only stayed the proceedings in all, dissentiente, Abbott, C. J. 2 B. & A. 598.

17. A sheriff is bound to let his prisoner arrested, upon *maine* process at large, upon reasonable sureties, and a bond with five sureties, three of whom are respectively worth more than the penalty of the bond, is sufficient, though the other two are worth less than the penalty. 5 M. & S. 223.

18. The court refused, on motion, to assimilate the practice of the court of C. B., to that of the court of K. B., in proceedings against bail. 1 B. & B. 490. Bail to the action.

19. After bail put in and justified, and a subsequent demand of plea, and time allowed for pleading, it is too late to move to enter an *exoneretur* on the bail piece, on the ground, that the plaintiff has not declared on the cause of action, which he swore to in his affidavit to hold the defendant to bail. 1 B. & B. 48.

20. A *capias quare clausum fregit*, issued against A. and B. with an *actiam* in debt, upon which A. was arrested, a special original debt, a *capias alias*, and *pluries*, and writs of exigent, issued against both, and B. was outlawed on the 23d of October, after which a declaration in debt on the original, was delivered against A. only entitled of Trinity term. Held, that the bail were not entitled to be discharged on a motion for that purpose, upon the ground of a variance, between the declaration and the process, upon which the defendant was arrested. 8 Taunt. 304.

21. In an action on a recognizance of bail, taken before a commissioner, in the county: the venue was laid in *Middlesex*; and the declaration stated, that the defendant of A. in the county of B., came before C., then and there being a commissioner &c. for B. and then and there before such commissioner, became bail. Held, that this was a sufficient averment, that bail was taken in B., so as to give C. authority to take it: that such averment being made without a venue; yet the county in the margin, without help, and that the action might be well brought, in *Middlesex*, where the recognizance was filed. 8 Taunt. 171.

22. *Scilicet*, that the court will permit bail to justify, as tenant by the curtesy of lands in the *Isle of Man*, without affidavit, or other evidence, that the law of tenancy by curtesy, prevails there. 8 Taunt. 148.

23. Bail permitted to justify at the rising of the court, the last day of the term. 8 Taunt. 56.

24. A. sued out a *cat. out.* against B., who, having put in bail, became bankrupt, and obtained his certificate; A. in about two months afterwards, signed an agreement to accept a composition from B., provided

provided all his creditors would accept the same: a few days after the signature of the agreement by A., execution was levied by him on B.'s bail. Held, that the *ca. sat.* against the principal, and all the proceedings against the bail, must be set aside; but that, as the bail had so long delayed their application, they could only be relieved on payment of costs. 8 Taunt. 28.

25. An *alias scire facias* issued against bail, must be left at the sheriff's office, four days, exclusive both of the day of lodging it and the day of the return. 4 B. & A. 537.

26. A member of parliament had given a bond, with two sureties, and conditioned for the payment of the sum to be recovered in the action, pursuant to 4 G. 3. c. 33., and before trial became bankrupt, the court refused to order the bond to be cancelled. 3 B. & A. 273.

27. A defendant usually residing in the country, arrested in London, in a town cause, may justify bail by affidavit, 5 Price, 13.

28. A commission appointed by the 4th and 5th W. & M., is not bound, by the letter of that act, to take no more than 2s. for taking bail, if he have been put to expense by travelling, or has taken extraordinary trouble at the instance of the parties, to effect the taking of the recognizances, or where there are no circumstances in the case which afford reasonable ground for a further charge. And where more had been received by him, by the voluntary payment of the bail, a rule obtained, calling on him, to show cause why he should not refund the extra money, discharged with costs. In cases where such an application would be entertained, it must be made by the party who has paid the money. 5 Price, 2.

29. An intervening Sunday is not to be reckoned as one of the four days during which a *ca. sa.* must lie in the sheriff's office to charge the bail, 1 B. & A. 528.

30. Where the defendant in an action, has become bankrupt, and obtained his certificate, after which proceedings are taken against the bail, the court will, on motion, relieve them, and will not direct an issue to try the fact, of the bankrupt's being a trader, the certificate by the 5 G. 2. c. 90. s. 7. and 13., being made sufficient evidence of the trading, &c., 1 B. & A. 332. But not *exoneretur* having been entered on the bail piece; such relief was granted only on payments of costs, *ib.*

31. The defendant having put in and perfected bail, a *ca. sa.* was lodged and returned *non est inventus*, and proceedings being had against the bail, they rendered the principal in time, the defendant was then bailed again, and discharged. Held, that proceedings could not be held against the last bail, without taking out a fresh *ca. sa.* 1 B. & A., 212.

32. In order to found proceedings against the bail in the action, the *ca. sa.* must be entered in the book at the sheriff's office, kept there for that purpose. 5 M. & S. 829.

## BAIL IN CRIMINAL CASES.

Where given,

1. Where the court think that a prisoner ought to be bailed for felony, if he be unable to defray the expense of being brought to Westminster for that purpose, they will grant a rule to show cause why he should not be bailed by a magistrate, in the county, with a *certificari* to return the depositions before them. 1 B. & A. 209.

2. A. sends his horse for the night to B., who turns it out after dark

dark into his pasture-field adjoining to, and separated from a field of C., by a fence which C. was bound to repair: the horse, from the bad state of the fence, falls from one field into the other, and is killed. Held, that B., though a gratuitous bailee, might maintain an action against C., and recover the value of the horse. 1 B. & A. 59.

3. Goods pledged (expressly) to secure by the produce of the sale acceptors, who have taken up and paid bills drawn on them by the owner, are released from further charge, as to other bills so taken up, and paid subsequently, if the amount of the original sum paid on account of the owner, have been repaid to them without resorting to a sale; and if, while the goods remain in the possession of the acceptors, the owner become insolvent, and has committed acts of bankruptcy before the original pledge be entirely redeemed by re-payment of the money secured by it; other advances be then made to him, by them, it is no case of mutual credit, within the 5 G. 2.

c. 30 s. 28. and the assignees of the bankrupt may recover the goods in trover; but the assignees under such circumstances, having elected to bring trover, cannot afterwards sue the defendant, to recover back the original sum for which the goods had been in the first instance pledged, although paid to them after the depositor had become bankrupt. 5 Price, 593.

### BANKRUPT.

1. A person living in the *Isle of Man*, coming from time to time to *England*, and buying goods which are afterwards sold in the *Isle of Man*, is a trader, against whom a commission of bankruptcy may issue in *England*, although he in fact never sold any goods in *England*. 4 B. & A. 418

Who are liable to become.

2. In order to constitute a party a trader within the meaning of the bankrupt laws, it is sufficient that he acknowledged himself to have been in partnership with one who was a trader; and is proved to have given directions in the concern; though no act of buying or selling during the time of the partnership can be established in evidence. 1 B. & B. 9.

3. A fraudulent conveyance made voluntarily by a trader in order to give a preference to particular persons, to the prejudice of his general creditors, is an act of bankruptcy, although the bankrupt subsequently continued to carry on his trade for three years, at the end of which time a commission issued. 4 B. & A. 382.

Act of bankruptcy.

4. The transfer of a trader's property under circumstances similar to those stated in the case of *Berney v. Davison*, is no act of bankruptcy, notwithstanding a difference from that case in the following particulars; no mention of the trader's personal property; no statement that the trustees to the transfer were not creditors of the trader; no mention of the trader's motive, no mention of the abstract of the unexecuted deed furnished to the purchasers; an additional statement that on or about the time of the execution of the transfer, the trader was insolvent, and stopped payment. 1 B. & B. 482.

5. Where A. having drawn a bill of exchange for £148 in favour of B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance. Held, that such bill of exchange was a good petitioning creditor's debt, although it appeared that subsequently to the commission, the bill had been duly presented and paid by the acceptors. 4 B. & A. 67.

Petitioning creditor.

6. A creditor being ignorant that an act of bankruptcy had been committed by his debtor, executed a composition deed for the amount of his debt, and received a dividend under it. Held, that he might, notwithstanding, become a petitioning creditor, in respect of the original debt. 5 M. & S. 161.

7. Interest accruing before the act of bankruptcy cannot be added to the principal sum due on a bill of exchange so as to constitute a good petitioning creditor's debt, unless interest be specially made payable on the face of the bill. 2 B. & A. 305.

3. A creditor of an insolvent trader may, after the debtor's discharge under the 53 G. 3. c. 102, take out a commission of bankruptcy against him, and his debt, although included in the insolvent schedule, will be a sufficient petitioning creditor's debt at law to support the commission. 4 B. & A. 266.

**What passes under the commission.**

9. An exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his banker's, who made him advances to the amount of its value; A. afterwards becoming bankrupt it was held by three justices, Bayley J. dissentiente, that the owner of the exchequer bill could not maintain trover against the bankers, the property in such an exchequer bill, like bank notes and bills of exchange, indorsed in blank, passing by delivery. 4 B. & A. 1.

10. The bankrupt assigned a policy of assurance to the defendant, the company, however, considering it invalid, paid the defendant half of the sum insured, as a gratuity on his giving up the policy. In an action of trover by the assignee of the bankrupt to recover the value of the policy. Held, that the value of the parchment only, and not the sum gratuitously paid, was recoverable. 8 Taunt. 264.

11. Certain policies of insurance belonging to *A.*, had been deposited by him as a security for a debt of 800*l.*, at a bankers. *B.*, who was acquainted with these circumstances, afterwards at the desire of *A.*, expressly undertook to take the policies and to settle with *H. W.* and to pay in the amount which he might receive at the bankers, to *A.*'s account there. Upon this undertaking, the policies were given to him and upon them he received the sum of 949*l.*, *A.* having become bankrupt, and being then indebted to *B.* in a larger sum, the latter refused to pay over the money so received. Held, that the assignee of *A.* could not (even with the assent of the banker) maintain any action against *B.* for the breach of his undertaking. 3 B. & A. 697.

12. The statutes 26 G. 3. c. 60., and 34 G. 3. c. 68. do not enure to prevent the operation of the statute 21 Jac. 1. c. 19. s. 11. upon British registered ships; therefore, where C. being owner of a ship, conveyed the same to S., but by the consent of S. continued to have the order and disposition until he became bankrupt. Held, that the property passed to the assignees of C. though the transfer was complete under the register acts. 5 M. & S. 228.

13. The 21 Jac. 1. c. 19. s. 11. is not repealed as to shipping by the ship register acts, and therefore when A., the owner of a ship, duly assigned his interest in it to B., and B. became the registered owner, but by his permission, A. continued to have the same in his possession, order, and disposition until he became bankrupt. Held, that the property in the ship passed to A.'s assignees under the statute of James. 2 B. & A. 193.

14. Goods were sent from J. G. in London, to M, at Sunderland, accompanied with a letter expressing a hope that some of the articles

would be approved of, and desiring to have those articles which were not approved of returned as speedily as possible. The letter contained an invoice headed "Mr. M. bought of J. G." wherein the prices of the articles were set down, but not carried out, on the evening of the day of the arrival of this letter, and the goods at Sunderland the effects of M. were seized under a writ, and on the following morning this shop was shut by the Sheriff, and never re-opened. In an action of trover for these goods bought by J. G. against the assignees of M., who had been made bankrupt, Held, that the goods did not pass to the assignees under the statute 21 Jac. 1. c. 19. s. 11. 8 Taunt. 76.

15. Where the question was whether a bankrupt had possession of a stock of bark as reputed owner. Held, that evidence of his being reputed the owner of it was properly admitted, facts having been proved, which amounted to a disposition of the property by him as owner. 3 B. & B. 269.

16. A and B, owners of a ship, executed an absolute bill of sale to C. and D. for a nominal consideration; there was a parol agreement between them that C. and D. should accept bills for the accommodation of A. and B.; that the ship should be a security to C. and D. for any advances they should make on such acceptances, and that until default made by A. and B. in providing for the acceptances, the ship should remain in their possession and management. The ship was registered in the names of C. and D. but A. and B. remained in possession and management of her, appeared to the world as owners, and obtained credit from appearing so. Before default made by A. and B. in providing for the acceptances, C. and D. became bankrupts, and their assignees immediately seized and sold the ship. A. and B. afterwards became bankrupts. Held, that trover for the ship could not be maintained by their assignees, against the assignees of C. and D., for the parol agreement could not be set up against the bill of sale, and the case did not come within the statute of James, the ship having been seized by the defendants before the bankruptcy of A. and B.; and though the bill of sale, unaccompanied by possession, might be void as against creditors, it was binding upon A. and B. and their assignees. 2 B. & A. 134.

17. A trader being seized of an estate for life, with the general power of appointment, with remainder in default of appointment to himself in fee, after having committed an act of bankruptcy, upon which he was afterwards declared a bankrupt, executes his appointment in favor of an appointee. Held, that all his interest having passed to the assignees by the assignment, that such appointment was void, and therefore that his assignees under the commission had a sufficient legal estate to maintain an ejectment. 2 B. & A. 99.

18. The defendants being unable to procure payment for barley which they had sold, and suspecting the vendor to be in bad circumstances, repurchased the barley by a third person and in his name, a short time before the bankruptcy of the vendor, who was not privy to the advance of the defendants. Held, that this was no fraud within the bankruptcy laws. 1 B. & B. 550.

19. Act of bankruptcy by lying two months in prison; during the imprisonment A. advanced to the bankrupt money, for the purpose of settling with his creditors; the purpose failing, a part of the money was repaid to A. by the bankrupt. Held, that this repayment was protected, and that the assignees could not recover the money so repaid. 2 B. & A. 683.

20. The issuing of a commission of bankruptcy is not of itself sufficient notice to all the world, of a prior act of bankruptcy having been committed; and therefore if a payment be made of a debt to a bankrupt after the issuing of such commission, but before the party paying has any actual knowledge of the bankruptcy such payment will be protected within 1 Jac. 1. c. 15. s. 14. 4 B. & A. 523.

21. The acceptor of a bill of exchange which is drawn and accepted after the issuing of a commission of bankruptcy, but before the commission is opened or appears in the gazette, is not protected by the statute 1 James 1., although he has not any knowledge of bankruptcy or of the issuing of the commission, and pays the bill to a bona fide holder; for the statutes 46 G. 3. declare the issuing of the commission to be sufficient notice of a prior act of bankruptcy. 3 Taunt. 365.

Relative to the assignment.

22. A testator having a son and daughter, and the latter having several children, devised to his son *W. F.* in fee, and if he should have no children, child, or issue, the said estate was, on the decease of *W. F.* to become the property of the heir at law, subject to such legacies as *W. F.* might leave to the younger branches of the family. Held, that *W. F.* took under this will, an estate in fee, with an executory devise over to the person, who, on the happening of the event, contemplated by the will, should become the heir at law of the testator. 3 B. & A. 546.

23. A joint commission of bankruptcy having issued against the tenant for life, and the tenant in tail. Held, that the assignees by the bargain and sale, only took an estate for life in the premises, and a base fee on the remainder. 3 B. & A. 557.

Relative to the assignees.

24. A release of an under tenant, by the assignees of a bankrupt, does not amount to an acceptance by them of the original lessee. 8 Taunt. 325.

25. When the assignees of a bankrupt enter upon and take possession of his leasehold property, they become chargeable with the covenants in the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold. 1 B. & A. 303.

26. *A.* and *B.* being assignees under one commission of Bankruptcy, and *C.* being assignee under two other commissions, cannot sue jointly, but the declaration should state what their respective interests are. 8 Taunt. 134.

27. *A.* and *B.* were partners. *A.* committed an act of bankruptcy, and afterwards, but before the bankruptcy of *B.*, the sheriff seized goods which had belonged to *A.* and *B.*, under an execution against them. Held, that the assignees of *A.* and *B.* under a joint commission could not, suing as such, recover *A.*'s share of the property therein. 8 Taunt. 200.

28. Counts for money lent, and for money paid by the plaintiff as assignee of a bankrupt, were joined with counts for money lent and received to plaintiff's use, and upon an account stated with him as assignee. Held, upon error after verdict, that these counts were well joined. 5 M. & S. 284.

29. The defendant (in an action at the suit of the assignees of a bankrupt) had attended a meeting of the commissioners, and exhibited the account between him and the bankrupt, and afterwards made a part payment to the plaintiff on that account. Held, in an action for the balance remaining due, that this was *prima facie* evidence against the defendant, that the plaintiff was assignee, and that it was not necessary

necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy. 1 B. & A. 677.

30. A defendant against whom in an action for damages on a tort, a verdict has been taken, subject to the award of an arbitrator, held to be discharged from the debt by his certificate, obtained before the entering up of judgment where he had become bankrupt between the verdict and the making of the award, and that execution could not be sued out on the judgment; because the plaintiff might have proved the damages recovered under the commission, by production of the record. 7 Price 209. A surety under an annuity deed is not entitled under 49 G. 3. c. 121. s. 8, to prove the value of the annuity as a debt under the commission, and therefore where such a surety had redeemed the annuity subsequently to the bankruptcy, it was held that he was entitled to maintain an action for the value against the bankrupt who had obtained his certificate, and that, although, the grantee had proved under the 17th section. 3 B. & A. 186.

Relative to the Creditor.

31. A covenant in an indenture made between A. and B. (assigning to A. 4350*l.* payable under articles of agreement by J. S. to B. by instalments), that in case the said sum, or any instalment thereof should not be paid to A. at the times, and in the manner provided for by the articles, B. would, upon demand, pay to A. the said sum, or so much thereof, as should not be paid at the times, &c., was held, not to be discharged by the bankruptcy of B., as to any instalments accruing due after the bankruptcy; this not being a matter proveable under the commission either by statute 9. or 17. of 49 G. 3. c. 121. 5 M. & S. 21.

32. One of two assignees of a lease gave a bond to the lessee, by whom the assignment was made conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying the lessee against the nonperformance of the covenants; both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy. Held, that the lessee could not prove in respect of the penalty under the commission, the bond being incapable of valuation. Held, also, that he could not prove for the damages which had accrued previous to the bankruptcy, not having paid them to the lessor. Held, also, that the 49 G. 3. c. 121. s. 19. applies only to cases between the lessor and lessee, or assignee of the lease, and not to cases between the lessee and the assignee of the lease. 8 B. & A. 521.

33. A bond was conditioned for the payment of a sum of money to executors of the obligor, and of the interest during his life, payable on certain days within twenty days after demand; the obligor became bankrupt, and interest was then due, but no demand had been made. Held, there having been no forfeiture, that the bond did not constitute a debt proveable under the commission. Held, secondly, that it was not proveable as an Admiralty bond, within the meaning of 49 G. 3. c. 121. s. 17. 2 B. & A. 802.

34. Bail above are not sureties or persons liable for the debt of a bankrupt within 49 G. 3. c. 121. s. 8. 4 B. & A. 495.

35. A. drew a bill on B. for 400*l.*, which B., who was not then indebted to A., accepted; B. afterwards became indebted to A. for 286*l.* 11*s.* 6*d.*, and then drew on him for 163*l.* 8*s.* 9*d.*, the balance of the 400*l.*, and his last bill was sold to C. for its full value, to be paid for on a certain day; on that day B. committed an act of bankruptcy, and

and requested C. to keep the bill at the disposal of A. till B. had paid the bill for 400*l.*, as he was not entitled to the money until the bill for 400*l.* was paid. Three days after the bankruptcy, A., ignorant of that fact, accepted the bill, and afterwards paid the money to C., on an agreement that he should assist any claim of the assignees. The bill for 400*l.* at this time remained over, due and unpaid, in the hands of A., and B. was indebted to him in more than the amount of the bill in question. Held, that the assignees of B. could not recover against C., he being in the same situation as A., who had a larger claim against the estate of B., this being considered case of mutual credit between A. and the bankrupts. 8 Taunt. 156.

36. A sale of the property of a bankrupt, after an act of bankruptcy, but more than two months before the commission issued, is, since the 46 G. 3. c. 101. s. 1., a sale by the bankrupt, and not by the assignee: and a creditor of the bankrupt having become a purchaser, was holden (in an action brought by the assignee for the value of the goods) to be entitled to set off against such a claim the debt due to him from the bankrupt, this constituting a mutual credit between the bankrupt and such creditor, within the meaning of the 46 G. 3. c. 101. s. 3. 1 B. & A. 471.

37. A., previous to his bankruptcy, deposited a bill of exchange with B., for the specific purpose of raising money thereon, and B. advanced money on the bill. Held, that the assignees of A. were entitled to recover from B. the amount of the bill in an action of trover, they having tendered to B. the money advanced by him, though a general balance remained due from the bankrupt to B.; and that this did not form a case of mutual credit within the statute 5 G. 2. c. 30. 8 Taunt. 21.

38. Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved under the commission for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding, was afterwards dishonoured. Held, that the vendors were not precluded by the statute 49 G. 3. c. 121. s. 14. from suing the bankrupt for the amount of the last parcel of goods. 1 B. & A. 121.

Relative to the  
commission.

39. A bankrupt having obtained his certificate under a joint commission issued against him and others, is not estopped, when suing a stranger in trover, from controverting the validity of the commission, or from taking advantage of its illegality, as against such a stranger, between whom and the plaintiff there is no reciprocity. 4 Price, 240.

40. A prior commission of bankruptcy, which has never been acted upon or superseded, not being in legal operation, does not invalidate a subsequent commission, where such prior commission was produced for the purpose of proving notice of an act of bankruptcy. Held, that it was not necessary to show that nothing had been done under it; it is for the party raising the objection to prove the prior commission to be in legal operation. 8 Taunt. 176.

41. *Quære*, whether a joint commission sued out against three persons, pending two previous separate commissions against two of them, is valid in law as against the third; and whether the assignees appointed under the two former commissions (who were also assignees under the last) can maintain an action of trover to recover property of such third person jointly with him; or whether it be absolutely void at law, so that the person who is the object of it cannot sue jointly with them.

in the action; or whether such subsequent commission be merely voidable, and suspends his right to join till the former commissions are established, or the last superseded. 4 Price, 240.

42. A writ of supersedeas, reciting that a commission of bankruptcy issued on a day certain, is evidence to show that such a commission issued on that day. 5 M. & S. 76.

43. Commissioners of bankrupt are authorized to examine a witness. Relative to the commissioners. concerning the person, trade, dealings, estate, and effects of the bankrupt; and incidentally to this power, they may examine him, also respecting other individuals through whom they may be likely to obtain information on those points; and, therefore, where a witness was asked questions as to when and where he last saw the bankrupt's wife, held, that such questions are legal and material, and that the commissioners were justified in committing him for giving unsatisfactory answers to these questions; held, also, that the true criterion by which to judge as to the propriety of the commitment was to consider all the questions and answers collectively, and then to say whether the whole examination was satisfactory or not; and, therefore, where the commissioners, in their warrant, set out several questions to some of which, taken alone, the answers were satisfactory, held, also, that this was no objection to a warrant committing the party "till he should full answer make to the questions so put to him as aforesaid." 2 B. & A. 219.

44. A bankrupt, on the day appointed for his last examination before the commissioners, promises to produce a balance-sheet, if further time be given; several adjournments take place during a period of ten months, at which adjournment he represents an account in writing to be necessary in order to make the discovery required of his estate and effects, and he promises, from time to time, to produce the balance sheet; that not being produced at the last adjournment, and no sufficient reason being given by him for not producing it, it was held that the commissioners were justified in committing him. 4 B. & A. 356.

45. *Semble*, that by the 5 G. 2. c. 30. s. 1. the bankrupt is bound to give the commissioners, if requisite, an account in writing of his estate and effects. 4 B. & A. 356.

46. Where a warrant of commitment, by commissioners of bankrupts, after setting out the issue of the commission, the adjudicature of bankruptcy, &c., stated as the ground of commitment, that the bankrupt being brought before them, and they had proposed to administer an oath to him, he refused to be sworn, or to give an account of his property; held, that such warrant was legal, and that it is not necessary in it to set out any specific question in such case, for this is a refusal to answer all possible questions which can be suggested; held, also, that after the issuing of the writ of *habeas corpus*, and before the return to it, the commissioners may, if necessary, make a fresh warrant, stating more fully the cause for detaining the bankrupt in custody, and that such warrant may, by words of reference, incorporate the formal parts of the first warrant; held, also, that if both warrants are defective in form, the court will, if a substantial cause of commitment appear, re-commit of bankrupt *ex officio*; held, also, that a commitment by justice of the peace, under 5 G. 2. c. 30. s. 14, of the bankrupt, "until he shall be discharged by due course of law," is bad. 1 B. & A. 568.

47. By the 49 G. 3. c. 121. s. 8. the certificate of a bankrupt is Relative to the certificate. a bar, not only to any action at the suit of the surety for the recovery of

of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment by the bankrupt of the original debt when due; and, therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill, the certificate was held to be a good bar. 3 B. & A. 191.

48. The plaintiff, a lessee, assigned his term to the defendant, who thereupon gave to the plaintiff a bond to indemnify him against the rents and covenants in the lease; the bond was forfeited; the defendant afterwards became bankrupt, and the assignee accepted the lease. Held, that the plaintiff could recover on the bond, as he had not actually made any payment before the bankruptcy, and was, therefore, unable to prove under the commission; and as the court considered the statute 49 G. 3. c. 121. s. 19. not to apply to collateral securities, or to an assignee, but to be confined to the case of a lessee. 8 Tamm. 316.

49. A bill of exchange drawn by defendant in *Ireland*, and accepted and paid by plaintiff in *England*, is a debt contracted in *England*, and cannot, therefore, be discharged by a certificate under an *Irish* commission of bankruptcy. 4 B. & A. 654.

50. The obligee in a bastardy bond, after the bond had been forfeited, became bankrupt and obtained his certificate. Held, that the parish-officers were not thereby precluded from recovering upon the bond further expences incurred subsequently to the bankruptcy 1 B. & A. 491.

Relative to the  
bankrupt.

51. A bankrupt having escaped out of the custody of the marshal, and being at large, surrenders to a commission subsequently issued, and receives the protection conferred by 5 G. 2. c. 90. s. 5. Held, that he may, notwithstanding, be retaken and detained in custody by the marshal. 1 B. & A. 308.

52. The house of the plaintiff, an uncertificated bankrupt, was broken open, and effects acquired by him subsequently to his bankruptcy taken by the defendants, who had become his creditors since the bankruptcy, and did not know who were the assignees under the bankruptcy. The bankrupt having sued the defendants in trespass, they obtained, after a rule for plea, a surrender of the assignees' interest in the effects seized. Held, that this was a ratification of the seizure, and that the plaintiff could not recover. 1 B. & A. 282.

53. The general assignment of a bankrupt's personal estate under his commission does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as regards the term, and their acceptance of the estate, rents, &c. &c. and, therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy. 1 B. & A. 303.

54. A bankrupt, having surrendered in due time, refusing to answer certain questions of the commissioners regarding the disposal of money assumed by them to have belonged to him, giving, as this reason, that he means to contest the validity of the commission, is not guilty of felony within the 5 G. 2. c. 9. s. 1. 7 Price, 616.

55. A bankrupt, who has surrendered to his commission, is not guilty of felony within 5 G. 2. c. 9. s. 1, though he refuse to answer questions concerning his property. The bankrupt lay in prison two months

months on a civil process, after a criminal process had been discharged, and the discharge had been delivered to his attorney. Held, that this lying in prison constituted an act of bankruptcy, though it did not appear that the bankrupt had personal notice of the discharge. 1 B. & B. 308.

56. In an action against a member of parliament, two persons became sureties on a bond conditioned for the payment of such sums as should be recovered with costs. The cause proceeded, and notice of trial being given, the defendant filed a bill in equity, and obtained an injunction, pending which he became bankrupt. Having suffered a term to escape, after obtaining his certificate, without pleading it, the court refused to let them plead it as of the former term, except on condition of dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client. 3 B. & A. 557. Pleadings.

57. The clause in the 12 sec. of statute 5 G. 2. c. 30. depriving bankrupt of all benefit from his certificate in the case of losses at play, is to be considered as a qualification restraining the operation of the 7th section, which makes the certificate a bar; and evidence of such loss may be given in a court of law on the *similitur* to the general plea of bankruptcy. 1 B. & A. 22.

58. The assignees of a bankrupt, when nonsuited, are not entitled, under 49 G. 3. c. 121. s. 10., to the costs of proving, after notice to do so, the commission, trading, act of bankruptcy, and petitioning creditor's debt. 1 B. & B. 275. Evidence.

## BARON AND FEME.

1. Where a husband not separated from his wife makes an allowance to her for the supply of herself and family, with necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable for the debt. 4 B. & A. 252. Of the husband's disabilities.

2. Husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c. or representation she or he in her right might be entitled to, and that he would not do any act to impede the operation of that deed; but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates, and the wife having as executrix of R. M., commenced an action on a promissory note against defendant in the names of her husband and herself: the husband released the debt, which release was pleaded *puis darrain* continuance; the court on application ordered such plea to be taken off the record, and the release to be given up or cancelled, 4 B. & A. 419. Of the wife's privileges.

3. A married woman arrested of *mesne* process is entitled to be discharged out of custody, on filing common bail, although her husband had absconded, and the debt had been incurred by her while a *feme sole*. 1 B. & A. 165.

4. Where a bill of exchange was payable to a *feme sole*, who intermarried before the same was due, it was holden that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill. 1 B. & A. 218. Joinder in action.

5. In an action of assumpsit brought against a defendant for money lent to his wife, it must be alleged to have been lent at his request, or it Pleadings.

it will be insufficient, and that even after a judgment has been suffered by default. Nor is it cured by a count for money lent to the defendant, and his wife at the request of and his wife, although it is stated in both counts that the husband promised to pay. 4 Price, 48.

6. Declaration in trover against husband and wife, stated the defendant's converted the property to their own use. Held, sufficient after verdict. 3 B. & A. 685.

Miscellaneous.

7. Where the solicitor for a defendant sued jointly with his wife, for a debt due from her *dum sola* appears on his undertaking, and pleads for the husband only: the plaintiff (having caused the wife to be served with a copy of the process), may appear for her *secundum statutum*, and treating the plea so put in by the husband alone as a nullity, sign judgment for want of plea. 6 Price, 139.

8. A deed made between husband and wife, and a third person (a trustee) with a covenant by the husband to pay such third person an annuity in case the wife should live separate and apart from her husband, and should take one of her children to reside with her, is (*semble*) void, as being a deed made in contemplation of a future separation at the pleasure of the wife, and therefore contrary to the policy of marriage. *Semble*, a plea to an action of covenant on such a deed, that the wife afterwards lived and cohabited with the defendant for a long space of time, and then left him against his will and consent, and had ceased to live or cohabit with him since, is a good plea. Judgment for plaintiff, on a demurrer to such a plea by the court of exchequer reserved, on a writ of error, 7 Price, 577.

### BASTARD.

Filiation of.

1. By 49 G. 3. c. 68. s. 5. ten clear days notice, of the intention to appeal is required. Held, that the ten days are to be taken exclusively both of the day of serving the notice, and the day of holding the sessions. 3 B. & A. 581.

2. A warrant for the commitment of the putative father of a bastard child until he should pay a sum due for the maintenance of the child, and legal accustomed fees, or until he should be otherwise delivered by due course of law is bad, the magistrate not being authorized under 49 G. 3. c. 68. s. 3. to make such a warrant, 3 B. & A. 493.

3. *Semble*, that the entering into the recognizances required by 49 G. 3. c. 68. s. 5., before the justices who make an order of bastardy, does not dispense with the necessity of giving such justices notice of appeal against the order, the statute requiring the party to give notice of bringing such appeal, "and of the cause, and matter thereof." But held, that a parol notice of such appeal, and of the cause and matter thereof will be sufficient. 4 B. & A. 626.

### BILL OF EXCHANGE AND PROMISSORY NOTE.

Whether a bill, note, or agreement.

1. Where a note stated that J. S. promised to pay to A. or B., or order, a certain sum, and was signed J. S. or else J. G. or W. V. held, that this was not a promissory note by J. G. within the statute. Anse. 4 B. & A. 679.

2. A note, whereby the maker promised to pay to A. or B. or order, a certain sum, was held to be a promissory note.

a sum therein specified, value received, is not a promissory note within the meaning of the statute of Anne. 2 B. & A. 417. An action cannot be maintained at common law, upon such an instrument, even by the payee against the maker, although it is stated in the face of the note to be given for value received. *Ibid.*

3. A bill of exchange having been accepted generally, the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s Chiswell-street." Held, that this was a material alteration, and that the acceptor was thereby discharged. 4 B. & A. 197.

Alteration of.

4. In declaring against the acceptor of a bill of exchange, accepted payable at a particular place. Held, not necessary to aver a presentment at the place. 5 M. & S. 291.

Presentment of

5. A corporation not established for trading purposes, cannot be acceptors of a bill of exchange, payable as to less period than six months from the date, because such a case falls within the provision of the several acts passed for the protection of the *Bank of England*, by which it is enacted, that it shall not be lawful for any body corporate, to borrow, owe or take up, any money upon their bills or notes, payable at demand, or at a less time than six months from the borrowing thereof. *Quære*, whether any, except a trading corporation, can bind themselves as parties to a bill of exchange. 3 B. & A. 1.

Acceptance of.

6. Where a bill of exchange being presented and left for acceptance, was refused acceptance by the defendant, but remained afterwards, for a considerable space of time in his hands, and was ultimately destroyed by him. Held, by three justices dissentient, Lord Ellenborough, C. J. that the defendant was not thereby liable as acceptor of the bill. 1 B. & A. 653.

7. The vendor of goods had been in the habit of drawing bills in payment upon the vendee, and discounting the same with bankers, by whom the bills were transmitted by post for acceptance, the vendee cautioned the bankers to enquire when they discounted any such bills, whether the goods, for which such bills were respectively drawn, had been delivered, and the carrier's receipt sent, and assured them that in that case they would be accepted. The bankers afterwards discounted a bill, and transmitted the same for acceptance to the vendee, who detained it in his possession for ten days, and then informed the bankers that he could not accept the bill, as the invoice of the goods had not been delivered: and, after a further interval of sixteen days, the bankers having made no objection to his detaining the bill, returned the same; the vendor having then stopped payment, without delivering the goods, or sending the carrier's receipt. Held, that the drawee of the bill was not liable as acceptor. 2 B. and A. 26.

8. *Quære*, whether in any case the mere detention of a bill, for an unreasonable time, by the drawee, with whom it is left for acceptance, in point of law amounts to an acceptance. 2 B. & A. 26.

9. Where the drawer of a bill wrote to the drawee, stating that he had valued on him for the amount, and added, "which please to honour," to which the drawer answered, "the bill shall have attention." Held, that these words were ambiguous, and did not amount to an acceptance of the bill, inasmuch as, although an acceptance may be made by a letter to a drawer, still that can only be so where the terms of the letter do not admit of doubt. 2 B. & A. 118.

10. Where a bill was drawn for the accommodation of the indorsee, and the indorsee, or the drawer had any effects in the hands of the acceptor. Held, that a subsequent indorsee, in order to entitle him to recover against the drawer, is bound to give notice of nonpayment. 3 B. & A. 619.

Indorsee to give notice of nonpayment.

Notice of dishonour.

11. Assumpsit on a promissory note, payable twelve months after date to the defendant and indorsed by him as a security for the debt of the maker. Held, that the defendant was entitled to notice of non-payment by the maker, and that evidence of a parol agreement at the time of making and indorsing the note, that payment should be demanded till after the sale of the estates of the maker, could not be received as a waiver of the right to such notice. 8 Taunt. 92.

12. In an action against the drawer of a bill, payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor, nor is it any defence that the bill was accepted for a gaming debt, if it be indorsed over by the drawer, for a valuable consideration to a third person, by whom the action is brought. 4 B. & A. 212.

13. When the acceptor of a bill of exchange having made it payable at Messrs. C. and Co's has not sufficient effects in their hands at the time when the bill becomes due, he is not entitled to notice of its dishonour. *Quære*, whether in the case of such an acceptance any notice be under any circumstances necessary. 4 B. & A. 200.

14. Where defendant not being indebted to defendants for goods, sold, and C. being indebted to defendant's, plaintiff with consent of defendant, drew a bill on C., payable at two months, which C. accepted, but afterwards dishonoured. Held, that defendant was not entitled to notice of the dishonour, his name not being on the bill, and that the bill was not to be esteemed a complete payment of the debt, under statute 3 and 4 Anne, c. 9. s. 7., 5 M. & S. 62.

15. A country banker, with whom a bill of exchange, payable in London, is deposited, has an entire day after receiving notice of its dishonour, to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough; therefore where the indorsee of a bill payable at a banker's in London, deposited it with the banker in the country, who caused it to be duly presented for payment, on the 14th, when it was dishonoured, and notice sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th, (being Sunday) and they on the next day, sent notice by the post, to the indorsee, and not before twelve at noon, at which time the post set out for the place where the indorsee resided. Held, that this notice was within time. 5 M. & S. 68.

16. The drawer of a bill of exchange is not discharged by the want of notice of non-acceptance, where the bill has passed into the hands of a *bond fide* indorsee for value, who had no knowledge of the dishonour. 5 M. & S. 282.

17. Where the defendant being indebted to the plaintiff, paid to him the debt in country bank notes, on Friday, several hours before the post went out, and the plaintiff transmitted them partly by a coach on Saturday and partly by Sunday night post, and both parts arrived in London, on Monday, and were presented for payment and dishonoured on the Tuesday. Held, that the true rule is, that a party in order to avoid laches, must give notice by the next day's post, and not by the next possible post, and that the plaintiff in so transmitting these notes, had been guilty of no laches, and might consider them as no payment, and recover for the original debt. 2 B. & A. 493.

Protest.

18. To entitle the indorsee of an inland bill of exchange, to recover interest from the drawer, it is not necessary to protest the same for non-payment. 2 B. & A. 696.

On the negotiation of.

19. Trever will be for bills of exchange, indorsed to an agent of the plaintiff's, or order for their account, and deposited with the defendants

ant's by such agent, as a security for past and future advances, by the defendants to him. 8 Taunt. 101.

20. The defendant drew a bill of exchange on *A.*, which *A.* accepted, payable to the order of *B.*, who indorsed it to the plaintiffs. On the dishonour of the bill, the plaintiffs brought their action against the defendant: the bill being then held by the plaintiffs as agents of *B.*, a former bill had been drawn by the defendant on *C.*, which at the time of its dishonour, was held by *D.* who took it up, and having struck out his indorsement, sent it to *E.* to be forwarded to *F.*, for the purpose of receiving the amount from the defendant; *F.* indorsed it, being then over due to *B.* for a valuable consideration: *B.* demanded payment for the defendant, who drew the bill in question as a substitution for the former bill, and delivered it to *B.* before this latter bill become due; *D.* gave the defendant notice to pay it. Held, that this latter bill was the property of *D.*, and that the plaintiffs were not entitled to recover the amount of it from the defendant, 8 Taunt. 114.

21. A person having three bills of exchange applied to a country banker, with whom he had no previous dealings, to give for them a bill on *London*, of the same amount, and the bill given by the banker was afterwards dishonoured. Held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange, 2 B. & A. 327. Held also, that if the exchange had not been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattles, in the order and disposition of the bankrupt, at the time of his bankruptcy, within the statute of James. *Ibid.*

22. Where all parties have had due notice of the dishonour of a bill of exchange, a subsequent indorser is not discharged by a treaty between the attorney of the holder, the drawer (who was also prior indorser) and the acceptor, that the holder should wait a given time for the payment of the balance in consideration of receiving from the acceptor and prior indorser by a certain time, a stipulated proportion of the amount, a part only of which proportion was afterwards paid, although the subsequent indorser has had no notice of such treaty, or the result, nor was informed of the payment of any part of the money due on the bill, or of the ultimate non-payment of the balance, till some months after the original dishonour of the bill. *Sed nota*, the subsequent indorser was the person to whom the holders had sold the goods, for which the bill was given in payment, and the offer of a renewed bill by the same parties, had been expressly rejected by them. 3 Price, 521. Of the liability of.

23. The indorser of a bill of exchange which had been dishonoured, and which a subsequent indorser had made his own by laches, paid the bill, and immediately gave notice of dishonour to the defendant, a prior indorser. Held, that the plaintiff could not recover the amount, although it appeared that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period. 4 B. & A. 451.

24. In an action upon a bill of exchange with several endorsements by a plaintiff, who had paid the bill under protest, for the honour of one of the indorsers, it was held sufficient, even upon special demurrer, to state that he had paid the bill according to the usage and custom of merchants, without stating that he had paid it to the last indorsee. 3 B. & A. 430. Of the action on.

25. This court will now order it to be referred to the master, to compute principal and interest on a promissory note, or bill of exchange, &c. (as is the practice in the other courts) on motion. 4 Price, 134.

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### BILL OF LADING.

Construction.

By bill of lading, a ship owner undertook that goods should be delivered safe "the act of God, the king's enemies, fire, and all, and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted." The goods having been dispatched from the ship, in her boat, according to the usual course of trade in the *West Indies*, were together, with the boat, lost in a hurricane. Held, that the ship owner was not liable under the terms of the bill of lading to make good the loss. 1 B. & B. 454.

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### BILL OF PARTICULARS.

When demand-  
able.

Defendant having pleaded in abatement, that four others were jointly liable, with himself, the plaintiff, applied to the defendant's attorney, to give the places of residence, and additions of those persons which he refused, unless the action were discontinued; under these circumstances the court made a rule absolute, for the defendant to deliver such particulars, or in default thereof, for setting aside the plea. 4 B. & A. 93.

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### BRIDGE.

Indictment for  
not repairing.

The court of quarter sessions cannot impose more than one fine for the non-repair of a bridge. 4 B. & A. 469.

In a plea by the inhabitants of a county that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge, situate within the township, it is not necessary to state any consideration for such prescription. 4 B. & A. 623.

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### BYE-LAW.

Construction of.

A bye-law of a corporation directed that upon the happening of any vacancy in the number of twenty-four common council, such vacancies should be filled by the freemen inhabiting the town, and that a court should be holden once every year, at which it should be lawful for the bailiffs to admit to the freedom of the town, such persons as had been resident therein for one whole year. Held, that this bye-law did not give to every person who had been so resident for that period, an absolute right to be admitted to the freedom of the borough, and the court refused a *mandamus* to the bailiffs to admit such a person. 4 B. & A. 271.

CANAL.

## CANAL NAVIGATION.

1. A canal act directed that no boat navigating therein which should not be capable of carrying a greater burden than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through the locks, unless on payment of tonnage equal to a boat of twenty tons. Held, that this was not confined to boats carrying some loading; but that empty boats came within the meaning of the clause, and that for them, tolls was payable as on boats having a loading of twenty tons. Held also, that the act having imposed different rates of toll on different goods carried along the canal, the tonnage on an empty boat was to be calculated at the lowest rate applicable to any species of goods. *Statutes relative to.* 2 B. & A. 66.

2. Where by a canal act, a toll of 1s. per ton was imposed upon all coals, &c. navigated upon any part of the canal from a place A., or from any place within two miles thereof. Held, that this only applied to voyages commencing within those limits, and that no such toll was payable for coal loaded at a place more than two miles from A., although conveyed upon a part of the canal within two miles of A. 3 B. & A. 139.

3. An act of parliament provided that the M. canal company should not take any higher or greater rate of tonnage than should for the time being be taken by the B. canal company; and the latter by a resolution at a general assembly, and under their common seal, reduced their tolls. Held, that the M. canal company could not question collaterally, the validity of such resolution, but were bound by it. The B. canal company's act directed that no reduction of the tolls should take place unless assented to by two thirds of the proprietors, but allowed them to vote by proxy, a form for which instrument was given by the act. 4 B. & A. 453.

## CARRIER.

1. In an action of *assumpsit* against a carrier, evidence to prove negligence is admissible, and a gross neglect will defeat the usual notice given by carriers for the purpose of limiting their responsibility. *Liability of.* 8 Taunt. 144.

2. Where a valuable bank parcel sent by a stage coach is lost, and it is proved that on the arrival of the coach, the driver was in liquor, and that the book-keeper who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it. Held, to be a loss arising from gross negligence, and that the proprietors were liable as carriers for the value, notwithstanding they had put up the usual notice in their office, disclaiming liability to make good losses beyond 5*l.* 4 Price, 31.

3. A carrier is liable for gross negligence although the goods are above the value mentioned in his public notice, and although they are not specially entered and insured. 2 B. & A. 356.

4. A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such, and the plaintiffs with the knowledge of this, delivered a parcel containing bank notes to a large amount, without informing the carrier of its contents;

the coach in which the parcel was conveyed, was left at midnight standing for some time in the middle of a very wide street, with a porter who was ordered to watch it; during this time the parcel was stolen. At the trial two questions having been left to the jury; first, whether the plaintiffs had been guilty of an unfair concealment, by not informing the carrier of the nature and value of the parcel; and secondly, whether the carrier had been guilty of gross negligence. Held, by three judges (Best J. dissentiente), that the direction to the jury was right. 4 B. & A. 21.

Action against.

5. By a bill of lading, the captain was to deliver the goods for the consignor and in his name to the consignee, at the time of shipment the consignee had no property in the goods. Held, that an action against the ship-owners for damages done to the goods, must be brought in the name of the consignor, and that although the consignee had insured the goods, and advanced the premiums of insurance before the arrival of the ship. 3 B. & A. 278.

### CERTIORARI.

Statutes relative to.

The notice required by 13 G. 2. c. 18. s. 5. for removing an order of justices by *certiorari* must state on the face of it the name of the party applying for the writ. 4 B. & A. 289.

### CHARITABLE USES.

What are.

1. The owner of land, having at his own expense, built a chapel, which was used for the purpose of public worship, and the congregation having subscribed a sum of money for the purpose of enlarging and improving the same, he, in consideration that the money so subscribed, should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a pepper-corn rent during his life, and 10*l.* per annum after his death. A declaration of trust was afterwards executed by some of the lessees, declaring that they would hold the premises in trust for the congregation assembling at the chapel, and that in case the public worship would be there discontinued, then that they would assign the premises for *char.* Held, that this was a conveyance for the benefit of a charitable use, and therefore void within the 9 G. 2. c. 36. s. 1. 2 B. & A. 96. Held also, that neither the sum agreed to be expended on the premises, nor the rent reserved at the death of the lessor, could be considered a full consideration paid for the lease, so as to bring the case within the second section of that statute. *Ibid.* Held also, that the declaration of trust, although executed only by some out of the several lessees, was evidence against all of the purpose for which the lease was granted. *Ibid.*

Grants to.

2. A conveyance of copyhold lands to charitable uses in the lifetime of the party is within 9 G. 2. c. 36., and therefore must be made within the formalities required by that act. The court will not even after a long and undisturbed enjoyment, presume a bargain and sale, and enrolment of the same in chancery. *Quære*, if it would be sufficient in the case of copyhold to declare the uses by a deed, conformably to 9 G. 2. c. 36. and to cause such deed to be enrolled in chancery. 3 B. & A. 149.

## CHARTER PARTY.

1. By a charter-party, a ship was described to be of the burden of 261 tons, and the freighter covenanted to load a full and complete cargo. Held, that the loading of goods equal in number of tons to the tonnage described in the charter-party, was not a performance of this covenant, but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety. 2 B. & A. 421. Construction of.

2. By charter-party it was covenanted that the owner should receive on board, in *London*, all such goods as the freighter thought fit to load, and should proceed therewith to *Madras*, and there, after delivering her outward cargo, receive from the freighter's agents, a homeward cargo, and deliver the same in *London*; and that all the cabins but one was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo to superintend the stowage of the goods. Freight to be paid at so much per ton, on the register tonnage of the ship; the captain and crew were employed and paid by the owner. Held, there being no express words of demise of the ship itself, in the charter party, the freighter did not thereby become the owner for the voyage, but that the possession continued in the owner, and that he therefore had a lien upon the cargo for his freight. 2 B. & A. 503.

## CLERGY.

1. A grant of part of the chancel of a church by a lay impropriator to A., his heirs, and assigns, is not valid in law, and therefore such grantee or those claiming under him, cannot maintain trespass for pulling down his pews there erected. 1 B. & A. 498. In relation to grants by.

2. By his induction the parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it. 2 B. & A. 470. In relation to benefices.

3. A parson who resigns his living is not entitled to emblements. 2 B. & A. 470.

4. Under 53 G. 3. c. 127. s. 7. a party summoned before two justices for non-payment of a church rate, may give them notice that he disputes the validity of the rate, or his liability to pay the same, although no proceeding is commenced in the ecclesiastical court; and where a party so summoned, told the justices that he would bring an action against any person who ventured to levy the rate, as he thought he had no right to pay because he had no claim to, or seat in the chapel. Held, that this was sufficient notice. 5 M. & S. 248. In relation to churches.

5. An action for money had and received, cannot be maintained against a church-warden, to recover back dues which previous to the commencement of the action had paid over to the treasurer of the trustees of a chapel. 8 Taunt. 136.

6. The mode of burying the dead is a matter of ecclesiastical cognizance, and therefore where the question was whether a parishioner had a right to be buried in the parish church yard, in an iron coffin, which was a new and unusual mode, the court refused a *mandamus*. 2 B. & A. 806. Sepulture.

## COMMON TENANTS IN.

Miscellaneous.

*Assumpsit* for money had and received may be maintained against one who had been a member of a benefit-club, for money entrusted to his keeping by the rest of the society, in the name of the officers, properly appointed for managing their affairs under the articles. If by the articles the society are empowered to appoint a treasurer, an appointment of two persons to be treasurers is within the power. It is not an objection to such an action, that the defendant having been a member at the time when the promise is laid, to have been made in the declaration, was a partner or tenant in common, and therefore could not be sued in *assumpsit* for money had and received. 6 Price, 131.

## CONDITIONS IN CONTRACTS.

Of conditions precedent.

1. By charter-party, the freighter covenanted to pay to the owner freight, at and after the rate of so much per ton per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months, as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of, such freight to be paid to the commander of the ship in the manner following, viz. so much as might be earned at the time of the arrival of the ship at her first destined port abroad; to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods. Held, that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad, was a condition precedent to the owner's right to recover any freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss. 2 B. & A. 17.

2. In an action on a covenant that on the arrival of the plaintiff's ship at a certain port, where he undertook to receive the defendant's cargo and sail for *England* therewith, with the next June convoy, provided the ship arrived, and was ready to load sixty-five running days, before the sailing of such ship's convoy, the defendant would provide a cargo of produce in time for her to load the same, and join the June convoy for *England*, provided she arrived out and was ready to load, and notice thereof was given to the agents of the plaintiff in error, sixty-five running days previous to the running of the said convoy, and on her arrival, &c. receive the said cargo, and pay the current freight: it is not a condition precedent to the defendant's part of the contract, that the ship should so arrive, but he is still bound to supply a cargo, though not in time to enable the plaintiff to sail with that convoy. And to a breach assigned that though, &c. (averring the arrival and being ready to load) the defendant did not provide a sufficient cargo in time to enable her to sail with that convoy, but detained the ship for a certain time after the sailing of the convoy, whereof, &c. it is no answer, to plead that the defendant did not so detain the said ship, &c. the gist of the action being the loading her, &c. 4 Price, 36.

Of conditions concurrent.

3. The defendant, as owner of a vessel, covenanted by charter-party, *A.* as freighter, to take on board a cargo in the *Brazils*, and deliver

deliver the same in *England*: *A.* covenanted to put the cargo on board, and pay freight at a certain rate per ton; part in money on the arrival of the vessel, and the remainder by bills at two months after the delivery of the cargo. The owner bound the vessel and her freight, and the freighter bound the cargo, for the due performance of their respective covenants. Part of the cargo was shipped for *A.*, and part for other consignees. The defendant delivered the goods to the other consignees on payment of the freight, at a less rate than that contracted for by the charter-party; but refused to deliver to the plaintiffs the goods consigned to *A.*, which *A.* had assigned to them, without their paying the whole of the freight, and under the terms of the charter-party. Held, that the defendant in detaining the goods of the plaintiffs until payment of the freight stipulated for by the charter-party, as the delivery of the goods and the payment of the freight were to be considered as concomitant acts. 8 Taunt. 280.

4. The owner of a vessel covenanted by charter-party to let the vessel on freight, and to deliver the cargo in good condition; and the freighters covenanted to pay the freight on delivery of the cargo, part in money, and the remainder by bills at four months. Held, that the owner might detain the cargo until payment of the freight: the delivery of the cargo and payment of the freight being concomitant acts. 8 Taunt. 293.

5. The defendant purchased a leasehold estate of the plaintiff's at a public auction, subject to certain conditions of sale, which were "that the purchaser should immediately pay down a deposit, in part of the purchase money, and sign an agreement for payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand; and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title, on payment of the remainder of the purchase money." *Assumpsit* was brought by the vendor against the purchaser for the non-performance of the conditions on his part. After a verdict for the plaintiffs on a motion in arrest of judgment on the ground that the plaintiffs had not set out their title or tendered the conveyances to the defendant. It was held, that the plaintiffs were not bound to set out their title, and that allegations that they were ready and willing to convey, and that they were ready and willing, and actually offered to convey, were equivalent to a performance of the conditions on their parts. 8 Taunt. 62. Validity of.

### CONSPIRACY.

1. An indictment charged that defendants conspired by divers false and subtle means and devices, to obtain from *A.* divers large sums of money, and to cheat and defraud him thereof. Held, that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. 2 B. & A. 204. Indictment for.

2. Upon an indictment against *A.*, *B.*, and others, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held, *A. B.* having presided at this meeting; that resolutions passed at a former meeting, assembled a short time before in a distant place, and at which *A. B.* also presided, and the avowed object of which meeting was that of the meeting

mentioned in the indictment, were admissible in evidence to show the intention of *A. B.* in assembling and attending the meeting in question. A copy of these resolutions delivered by *A. B.* to the witness, at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, is admissible without producing the original. Large bodies of men having come to this meeting from a distance, marching in regular order, resembling a military march, it was held to be admissible evidence to show the character and intention of the meeting, that within two days of the same, considerable numbers were seen training and drilling before day-break, at a place from which one of these bodies had come to the meeting, and that on their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again. Held also, that it was admissible to show in evidence, for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing. Parol evidence of inscriptions, and devices on banners and flags, displayed at a meeting, is admissible without producing the originals. Upon such an indictment, evidence of the supposed misconduct of those who dispersed the meeting is not admissible. 3 B. & A. 566.

### CONSTABLE.

#### Privileges of.

1. A constable acting under a warrant, commanding him to take the goods of *A.*, takes the goods of *B.*, believing them to belong to *A.* Held, that he was entitled to the protection of the stat. 24 G. 2. c. 44. s. 8., and that an action against him must be brought within six calendar months. 3 B. & A. 330.

2. Where a constable, having a magistrate's warrant of distress to levy a church rate under the statute 53 G. 3. c. 127, broke the door of, and entered plaintiff's dwelling-house. Held, that although he thereby exceeded his authority, yet that no action could be maintained after the expiration of three calendar months. 1 B. & A. 227.

### CONTRACT.

#### Consideration.

1. Declaration stated that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour, and thereupon in consideration of the premises, and that plaintiff would give up the annuity, defendant promised to pay as much as the annuity was reasonably worth. Held, bad upon general demurrer. 4 B. & A. 650.

#### Mutuality.

2. Whereupon the letting of premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over, and assented to, by him, and it was then agreed that he should, on a future day, bring a surety and sign the agreement, neither of which he ever did. Held, that the memorandum was not an agreement, but a mere unaccepted proposal, and that the terms of the letting, therefore, might be proved by parol evidence. 3 B. & A. 326.

3. Where

3. Where the defendant presented for payment a post-dated check, knowing it to be post-dated, and that the maker of it was insolvent, and the plaintiff, in ignorance of these circumstances, paid the check for the honour of the maker, expecting funds from him in a short time, though they had none at the moment. A verdict having been taken for the defendants, with leave for the plaintiffs to move for a new trial; the court granted a new trial. 1 B. & B. 289.

Rescission of.

4. Where a sheriff claimed, as of right upon a warrant issued by him in the execution of his office, a larger fee than he was intitled to by law, and the attorney paid it in ignorance of the law. Held, that the latter might maintain money had and received for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. 2 B. & A. 462. Held, also, that the sheriff was not entitled to more than a fee of four pence upon every warrant issued by him. Ibid.

5. A. a trader in embarrassed circumstances, being indebted to plaintiff for money lent, and goods, plaintiff promised to induce A.'s creditors to agree to a composition on condition of A.'s giving the plaintiff a promissory note for the money lent, signed by A. and another. As security the note was given by A., and signed by defendant. As security the plaintiff and A. agreed to keep the matter a secret from A.'s creditors, and the plaintiff endeavoured, but in vain, to accomplish a composition with them. Held, that the transaction was fraudulent and void, and that plaintiff could not recover on the note against the defendant. 1 B. & B. 447.

Avoidance of.

6. Where A. agreed to sell to B. one-third share of a ship, which was then to be employed on a joint adventure, in the exportation of military stores to South America, contrary to an order in council then in force. Held, that the agreement being entire, and containing on the face of it, an illegal stipulation, it lay on the party seeking to enforce the same, to show that means had been used to obtain a licence, or that the illegal purpose had been abandoned, and that in failure thereof A. could not recover for the share of the ship. 1 B. & A. 53.

Illegal.

7. *Scemle*, that a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of these carriages, and no other, is illegal. 1 B. & A. 683. But held, at all events, the wager having been deposited in the hands of the stake-holders, that either party, having demanded his deposit before the wager was won, was entitled to have it returned to him, and, on refusal, to maintain an action against the stake-holder. Ibid.

8. Money deposited with a stake-holder, as a bet on the event of a foot race, may be recovered from him by either party in an action. For money had and received after the race has been run, and the parties differ as to the winner, a nonsuit on the ground that such actions are an idle waste of the time, and hinderance of the business of courts of law set aside. 7 Price, 540.

9. Money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back by him. 3 B. & A. 179.

10. A., by letter, offers to sell to B. certain specific goods, receiving an answer by return of post. The letter being mis-directed, the answer, notifying the acceptance of the offer, arrived two days later than it ought to have done; on the day following that when it would

Sufficiency.

would have arrived if the original letter had been properly directed, *A.* sold the goods to a third person. Held, that there was a contract binding the parties from the moment the offer was accepted, and that *B.* was entitled to recover against *A.* in an action for not completing his contract. 1 B. & A. 681.

Construction.

11. By charter party the defendant covenanted to pay freight for a cargo at a certain rate per ton freight measurement. To an action of covenant for nonpayment of freight, he pleaded, first, that by the usage of the particular trade, an account must be produced to the freighter, by the owner, before he could demand payment of the freight, and that no such account was delivered; and, secondly, that it was the duty of the plaintiff to deliver a freight measurement, and that he had not done so. Held on demurrer, that these pleas were bad, as the usage so pleaded would cease, a new condition, and vary the terms of the original contract. 8 Taunt. 254.

12. Upon a parol demise a rent to take place from the following lady day, evidence of the custom of the country is admissible to show that by "lady day" the parties meant "old lady day." 4 B. & A. 588.

## CONVICTION.

Relative to the judgment.

1. Two justices may proceed under 12 G. 3. c. 61. s. 18. to adjudge a forfeiture of gunpowder, unlawfully conveyed to the person seizing the same, but the conviction must show that the person to whom it is adjudged is the person who seized it, being adjudged to *T. G.*, the person who seized the same, without more, is insufficient. 5 M. & S. 133.

Relative to the commitment.

2. A conviction, by two justices under stat. 17. G. 2. c. 38. upon complaint of the overseers of a parish against the late overseer, for refusing, and neglecting to deliver over to them a certain book belonging to the parish, called the bastardy ledger, convicting him of the said offence, and adjudging that he should be committed to the common gaol, to be safely kept until he should have yielded up all and every the books, concerning his said office of overseer, belonging to the parish, was held void, as to the adjudication respecting the imprisonment, for excess, the same extending beyond what was previously required of the person convicted; and a warrant of commitment founded on this conviction, and directing the gaoler to keep him in the terms of the adjudication, was also holden void in toto, for which trespass and false imprisonment would lie against the justices, although the conviction had not been quashed. 5 M. & S. 314.

Relative to appealing.

3. By 50 G. 3. c. 48. s. 25. it is provided that any party aggrieved by the conviction under that act who shall enter into a recognizance to appear at the next sessions, shall be at liberty to appeal to such sessions. Held, that this dispenses with the necessity of any notice of appeal, and that if the party duly enter into the recognizance, the sessions are bound to hear the appeal. 4 B. & A. 276.

4. Where a statute gives a party aggrieved a right of appeal, on giving a security to a specified amount he may enter and respite his appeal at the next sessions, after having given such security without notice to the other side; but after the appeal has been respited, if he does not give the usual notice of trying it, the sessions will be authorized to dismiss it altogether. 2 B. & A. 694.

5. In

5. In an action against a magistrate, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts contained in it. 1 B. & B. 432. Relating to the conclusiveness of.

6. In trespass against magistrates for taking and detaining a vessel, a conviction by the defendants under the bumboat act (no defect appearing on the face of the conviction) is conclusive evidence that the vessel in question is a boat within the meaning of the act, and properly condemned. 1 B. & B. 432.

### COPYHOLD.

1. A copyhold was surrendered to the use of husband and wife for their natural lives, and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever. Held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor. 4 B. & A. 303. Surrender of.

2. Where the lord of a manor, by copy of court roll, granted a reversion of certain premises, then in his tenure, to have and to hold to B. for his life, immediately after the death of A. Held, that B. might, on the death of A., maintain an ejectment, although he had never been admitted, he having acquired a perfect legal title by the grant, without admittance. 2 B. & A. 453. Admittance to.

3. A copyhold tènement, to which a right of common was annexed, having vested in the lord, by forfeiture, he regranted it as a copyhold with the appurtenances. Held, that having always continued demisable while in the hands of the lord, it was a customary tènement, and as such, was still entitled to right of common. Held secondly, that a custom for the lord to grant leases of the waste of the manor without restriction is bad in point of law. 3 B. & A. 153. Rights of the lord.

### COPYRIGHT.

1. In declaration for pirating a book, on allegation that plaintiff was the author of a book, being a musical composition, called A., is well supported by showing him to be the author of a musical composition of that name, comprized in, and occupying only one page of a work with a different title, which contained several other musical compositions. 2 B. & A. 298. Subjects of.

2. The 54 G. 3. s. 156., does not impose upon authors as a condition precedent to their deriving any benefit under that act, that the composition should be first printed, and therefore an author does not lose his copyright by selling his work in manuscript before it is printed. 2 B. & A. 298. Title to.

3. An author whose work had been published more than 28 years before the passing of the 54 G. 3. c. 156., is not entitled to the copyright for life. 1 B. & A. 396. Relative to the st. 54 G. 3. c. 156.

### CORONER.

A coroner's duty is judicial, and he can only take an inquest *super visum corporis*, and an inquest in which the jury were not sworn by the coroner himself, and *super visum corporis* is absolutely void. Inquisition by.  
The

The court will not therefore, after an adjournment by the coroner of such an inquest, grant any *mandamus* to compel him to proceed in it. 3 B. & A. 260.

### CORPORATION.

Relative to  
charters.

1. King Charles the Second, by charter, granted to the corporation of *Walsall* two fairs to be holden annually within the borough and foreign, and confirmed to them all markets which they then held, with a reservation of the rights of the lord of the manor; it appeared that a market had been holden immemorially in the *High-street* of *Walsall*, until a very late period, when the corporation finding it inconvenient, removed it out of the *High-street*, to another, and more convenient place within the borough; the corporation had exercised acts of ownership in pulling down an old market-house, and erecting a new one; the clerk of the markets, however, had been appointed by the lord of the manor, but he did not receive any toll from the persons frequenting it. The defendant having been indicted for a nuisance in erecting stalls in the *High-street*, after the removal of the market; the judge, upon the trial, left it to the jury, to say whether the corporation were owners of this market: adding, that if they were, the right of removal was incident to the grant. The jury having found in the affirmative, the court refused to grant a new trial. 1 B. & A. 67.

2. By the charter of a borough, it was directed that when it should happen that any of the capital burgesses should die, dwell out of the borough, or for the cause be removed, it should be lawful for the remaining to elect others into the place of those so happening to die, or be removed. Held, that these words were not so unambiguous as to warrant the court in granting a *mandamus* to admit two persons in the room of two non-resident capital burgesses, the corporation not having previously removed them for this cause from their offices. 3 B. & A. 590.

### COSTS.

For the de-  
fendant.

1. If the plaintiff take out of court a less sum than that for which he has originally proceeded, and below the amount fixed by the statute, as that for which a defendant may be held to bail, it is not in this court within the 43 G. 3. c. 46., if the plaintiff give a good reason for taking it out. 6 Price, 126.

2. The statute 43 G. 3. c. 46. s. 3. for allowing costs to a defendant, in case of arrest, without probable cause, does not extend to cases where a defendant pays money into court, and the plaintiff takes it out, though it be a much smaller sum than that for which the defendant is holden to bail. 1 B. & B. 66.

3. Where the defendants were held to bail for 130*l.* 11*s.*, and the cause being referred to an arbitrator, he found that only 20*l.* 4*s.* 9*d.* was due from them, the court would not allow the defendants their costs under 43 G. 3. c. 46. s. 3. 1 B. & B. 278.

4. The defendant was held to bail on an action for 25*l.*; he pleaded in abatement as to 12*l.* 10*s.*, and the general issue as to the remainder; verdict for the plaintiff for the latter sum. On motion for costs

under the 43 G. 3. c. 46. supported by affidavit, that the defendant believed the plaintiff had sued out bailable process for the purpose of extorting from him the whole sum. Held, not a case of malicious arrest within the statute. 5 Price, 1.

5. Where an executrix pleaded 1st *non-assumpsit*, 2d. *Ne unque* executrix, and 3d *Plene* administravit, and issues on the first pleas were found for plaintiff, and on the last for defendant: it was holden that the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial. 1 B. & A. 254.

On verdict or judgment as to past, only for the plaintiff.

6. In trespass two defendants appeared by the same attorney, and pleaded first general issue, and second, separate justifications, *A.* obtained a verdict generally, and *B.* obtained a verdict on his justification, but the plaintiff succeeded against him on the general issue. Held first, that *B.* was not entitled to any costs on the issue found for him; second, that the master in taxing *A.*'s costs, was right in allowing only one half of the attorney's costs for appearance, &c.; third, that the costs due from the plaintiff to *A.*, could not be set off against the costs due from *B.* to the plaintiff. 4 B. & A. 43.

7. *Assumpsit* on a promissory note drawn by *A.*, testator of defendant, payable to plaintiff *B.* Pleas, *non-assumpsit*, statute of limitations, and *plene* administravit. The two first issues were found for plaintiff; the last for the defendants; the prothonotary gave the plaintiff's costs on the whole and the *posted*; to the defendant's he gave costs on the third plea only. On a motion that the prothonotary review his taxation. Held, that the defendant having established an absolute bar, was entitled to the *posted*, and the general costs; and that the prothonotary must review his taxation. 8 Taunt. 129.

8. Where one of several issues is found for the defendant, he is not entitled to his costs on that issue, though in consequence of the plaintiff's withdrawing his record at the assizes, for the purpose of an amendment, and re-entering it, the defendant's witnesses were obliged to wait several days longer than they would otherwise have done. 1 B. & B. 222.

9. Trespass: four counts; for fishing in plaintiff's close, covered with water, several fishery, and free fishery, and carrying away plaintiff's fishes. Pleas, first, not guilty; second, that the close belongs to *W. A.*, defendant's master; third and fourth, that the several and free fishery belongs to *W. A.* New assignment setting out abutments of plaintiff's close and replication traversing *W. A.*'s several and free fishery. Pleas to new assignment: first, not guilty; second, that *locus* newly assigned is the close of *W. A.*; third, that *W. A.* has common of fishery over the *locus* newly assigned. The issue on the common of fishery was found for the defendant; as also, that part of the first issue which related to the second, third, and fourth counts of the declaration; the other issues were all found for the plaintiff, with 1*l.* damages, and 40*s.* costs on the first count. The court confirmed the taxation of the prothonotary, who had allowed the defendant general costs in the cause on the issues found for the defendant, and the plaintiff the costs of the issues found for the plaintiff. 1 B. & B. 465.

10. In an action on the 29 Eliz. c. 4., plaintiff is entitled to treble costs, as well as treble damages. 2 B. & A. 393.

In action on remedial statutes.

11. The defendant's pleading a tender to an action for goods sold, does not preclude him from entering a suggestion on the roll, to deprive the plaintiff of his costs, under statute 39 and 40 G. 3. c. 104, s. 12., London court of requests act. 5 M. & S. 196.

Where the suit in a superior instead of an inferior court.

12. The

Relative to obtaining security for.

12. The court will compel security for costs, where plaintiff resides abroad with a previous application to his attorney, but they will not order a stay of proceedings, unless such application has been made. 1 B. & A. 331.

13. Where the plaintiff, after issue joined, has been convicted of felony, and received sentence of transportation, the court will compel him, or his attorney, to give security for costs retrospective and prospective. 1 B. & A. 159.

14. Application that a plaintiff shall give security for costs, must be made before issue joined, although the issue was joined in the preceding vacation. 5 Price, 610.

15. Plaintiffs who live out of the jurisdiction of the court, may be compelled to give security for costs, though such plaintiffs sue as executors. 1 B. & B. 277.

16. A defendant in *replevin*, residing out of the jurisdiction of the court, is liable to give security for costs. 1 B. & B. 505.

Miscellaneous.

17. Where a rule is made absolute on payment by the applicant, of costs of the application affidavits, made in opposition, not read nor entered in the minutes, nor noticed in the order, will not be allowed on taxation. 5 Price, 576.

### COUNTY RATE.

Application of.

1. The sessions are not authorized to order the payment, by the bridgeman, to the clerk of the peace, of a *per centage* on all money raised for the repair of bridges in a particular district, in lieu of all his fees for indictments, presentments, &c. for bridges within it; although such *per centage* was claimed as an ancient fee, and had been paid without dispute for a long period of time. 1 B. & A. 312.

Assessment.

2. A district situate within the local limits of the county of York from time immemorial had been part of the county of Durham, yet had always contributed to the public burdens of the county of York. Held, that it was to be presumed that such district, either in the original division of land in counties, or at some subsequent period, when it was separated from the county of York, was made part of the county of Durham, on condition of its contributing to the burden of the county of York, and that such district was liable to the county-rate of Yorkshire. 8 B. & A. 72.

### COURT.

Superior.

1. The court will not take judicial notice of the local situation and distances in the different places in the counties of England from each other; and, therefore, where a return to an *habeas corpus* stated that the prisoner was found on board a vessel discovered within eight leagues of that part of the coast of G. B. called *Suffolk*, to wit, within eight leagues of O. in that county, it was held not to be averred with sufficient certainty that the vessel was not within four leagues of the coast of G. B., between the *North Foreland* in Kent, and *Beachy Head* in Sussex. 4 B. & A. 243.

Officers of.

2. The chief clerk is not entitled to poundage on money paid into court by the sheriff under 43 G. 3. c. 46. s. 2. 2 B. & A. 770.

Inferior.

3. It is no ground of error upon a judgment of an inferior court that the plaint was levied before the causes of action accrued. 3 B. & A. 605.

4. Plaintiff

4. Plaintiff in an inferior court from which a cause is removed by *habeas corpus*, and a rule for better bail given, is not entitled to a *procedendo*, after render of defendant, and notice of such render, although the render be made after the day on which the rule for better bail expires. 4 B. & A. 535.

5. A judge at *Nisi Prius* has the power of fining a defendant for a contempt committed by him in the course of addressing the jury. 4 B. & A. 329.

Of *Nisi Prius*.

6. The ecclesiastical court has jurisdiction *ratione loci* over the order and proceedings of vestry-meetings held in a church; and, therefore, where a rector had libelled; in that court, a parishioner for preventing him from presiding as chairman at such a meeting, a prohibition was refused. 3 B. & A. 241.

Ecclesiastical Court.

7. A court of general gaol-delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine. Service of an order of such court, calling upon the editor of a newspaper "to answer for contemptuously publishing such proceedings," at the office at which the newspaper was published, is good service within 88 G. 3. c. 78. s. 12., and the editor not having appeared, the fine was held to be properly imposed upon him in his absence. 4 B. & A. 216.

8. A justification in trespass stated that by custom a court had, from time immemorial, been holden before the steward and port-reave of a borough, or their sufficient deputy or deputies, and that a court was holden before C. D. the deputy of A. B., who was then steward and port-reave. Held, that upon this plea the two offices must be taken to have been compatible, and that the appointment of the deputy by the person holding both offices was sufficient. 3 B. & A. 60.

Borough court.

9. Upon a motion for a prohibition to the lord chancellor sitting in bankruptcy, it appeared that the assignees had seized as the property of the bankrupt a farm belonging to A. B., and had kept it a long time, and mismanaged it, and that the lord chancellor had referred it to the master to take the account between A. B. and the assignees in respect of such property and of its mismanagement; and afterwards, upon his report, had ordered a certain sum to be paid to A. B. by the assignees; the commission having previously superseded. Held, first, that the jurisdiction of the lord chancellor sitting in bankruptcy was not confined to the period during which the commission subsisted; secondly, that he had not exceeded his jurisdiction in ordering the master to take an account as to the mismanagement, &c. of the property; nor in making the assignees personally liable, beyond the funds in their hands, for such mismanagement; held, thirdly, that the lord chancellor had jurisdiction over all effects taken under the commission, as well those of strangers as of the bankrupt, and over the assignees for all acts done by them in their character of assignees, by virtue or under the commission; held, fourthly, that in cases where the lord chancellor has jurisdiction generally, this court has no authority to revise his order; held, fifthly, that no prohibition can be granted after the final order of the lord chancellor, unless there be an original want of jurisdiction apparent on the face of the proceedings. *Quære*, whether this court have authority to direct a prohibition to the lord chancellor sitting in bankruptcy. 3 B. & A. 128.

The lord chancellor sitting in bankruptcy.

10. An act of parliament created a court of requests in a city and its

Court of requests for Bath.

its liberties, and gave it jurisdiction over debt not exceeding 10*l*. due from any person residing within the city and its liberties to all persons residing within or without those limits. Held, that the court had jurisdiction over causes of action without the jurisdiction, provided the defendant lived within it. 3 B. & A. 210.

### COVENANT.

Construction of. 1. Where *A.*, being seized of certain real estates, conveyed part of them to the uses of the settlement at the time of his second marriage, and also covenanted with the trustees that he would, by will or otherwise, give and devise all other his real estates, and also his personal estate and effects whatsoever and wheresoever, to and amongst the children both of his first and second marriage, share and share alike; held, that this covenant was applicable only to such real and personal estate of which *A.* might die seized or possessed; and that it did not prevent him from disposing freely, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the date of the settlement. 3 B. & A. 531.

Pleading relative to.

2. Assignment of breach of covenant, in general words, although in the words of the covenant, held ill upon a demurrer to the defendant's plea, because the assignment did not show any particular act of the plaintiff, or in what particular respect he had refused to act, which amounted to a breach of his covenant. Such bad assignment not cured by pleading over a set-off of a demand (claimed in a different right from that in which the plaintiff, who was an administratrix, sued) to a declaration in covenant for unliquidated damages. 7 Price, 550.

3. Breach of covenant assigned that the defendant, to wit, on, &c. and on divers, to wit, nineteen other days, between that day, &c. and &c.; plea, that the defendant did not, on the several days in the declaration mentioned, &c.; special demurrer. Held, that the plea was bad, as it took an immaterial traverse, and tied the plaintiff down to prove breaches on all the particular days mentioned in the declaration. 8 Taunt. 190.

### CROWN.

Grants, construction of.

1. Grant of a liberty in a certain manor to *A.*, who grants the manor with, &c. to the crown. The crown grants the manor again to *B.* with all, &c. liberties, &c. in, &c., in as full and ample manner as *A.* had it; such re-grant passes nothing but what is expressly mentioned in words, as the subject matter of such grant, notwithstanding the words of reference to the former grant, which does not extend the operation of the latter beyond the precise terms of the patent. 5 Price, 217.

2. A grant of a liberty, in a manor, of goods and chattels of tenants in such manor attainted of felony, is confined to the goods, &c. of felons being locally situate within the manor, and does not pass goods, &c. laying out of it. *Seemle*, that if the words were "in, of, or upon," it could not be so extended. 5 Price, 217.

3. If the words "*Ex certis scientia speciali gratia et mero motu*," reduce a royal grant to the rules of construction to which the grants of private persons are subject, doubted. 5 Price, 217.

4. Stock

4. Stock and money in the funds are not goods and chattels, and do not pass by a grant of *bona et catalla felonum*. 5 Price, 217.

5. Stock has no locality, except for purposes of probate and administration. It is a chose in action. 5 Price, 217.

6. A grant of exemption from forestal duties does not pass the forestal rights from which those duties spring; therefore, a grant of exemption from forestal duties does not give such a right to the grantee as will give him a claim to an allotment on the inclosure of commonable lands within a forest, in consideration of the forestal rights. 5 Price, 269.

7. To forestal rights, there must be express words indicative of that particular purpose in the grant. *Semble*, such rights, properly, so called, are not grantable to a subject. 5 Price, 269.

8. A grant of a manor to *A.*, with particular words of reference to a previous grant to *B.*, as "with all liberties, &c. &c. &c. which *B.* had" — "in a full and ample manner as *B.* held and enjoyed, &c. &c." is not sufficient to pass forestal rights which had been granted to and enjoyed by *B.*, without express words. 5 Price, 269.

9. A decision in eyre against a former grantee, and submitted to by him, if followed by conformable usage, is conclusive on those claiming under him. 5 Price, 269.

### CUSTOM.

1. An usage for the landlord to pay a sum, in compensation to the off-going tenant, for labour and expence bestowed by him in tilling, fallowing, and manuring arable and meadow land, according to the course of good husbandry, the advantage of which labour and expence the tenant could not otherwise reap, is a reasonable usage, and such practice being a mere usage of the neighbourhood, is not to be considered as a custom strictly speaking, and need not be immemorial. The declaration averred, that the plaintiff had sowed divers, to wit twenty acres of land, with wheat and clover. Held, that this was, in substance, an averment that the land was arable. The declaration also averred the manuring of ten acres of meadow land. Held, that this was, in substance, an averment, that part of the land was meadow land. 1 B. & B. 224.

Of the distinction between custom and usage.

2. A custom that none but a freeman, or the widow or partner of a freeman, should sell by retail in a city or the suburbs, is valid in law. 4 B. & A. 438.

Valid.

3. A custom for the churchwardens of a parish to set up monuments, &c. in a church, without either the consent of the rector or ordinary, is illegal. 1 B. & A. 508.

Void.

### DEBTOR AND CREDITOR.

1. Plea to an action of covenant that plaintiff agreed with defendant, and his other creditors, to execute a composition deed, held ill on general demurrer. 7 Price, 604.

Composition between.

2. Where a creditor signs, and delivers a composition deed, although he does not set the amount of his debt opposite to his name on the deed, yet he is bound, by the terms of the composition, to the amount of his then existing debt. 1 B. & A. 103.

3. The plaintiff agreed to take a bill of exchange, drawn by the defendant, Vol. VII. Z z

defendant, and accepted by A., payable to order, in satisfaction of a promissory note for a much larger amount, on condition that the original note should revive if the bill should be dishonoured. The bill was dishonoured, but no demand was made on the defendant on the day it became due; and, on the following day, the defendant tendered the amount, which the plaintiff refused to accept, and sued on the original note. Held, that the plaintiff was not entitled to recover. 8 Taunt. 277.

4. Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterward executed the deed in the ordinary way, without saying any thing at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors. Held, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound. 4 B. & A. 440.

5. The creditors of an insolvent agreed, by an instrument (not under seal) that they would accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would release him from all demands; one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange, drawn by the debtor, and accepted by a third person; the money due on this bill having afterwards been paid by the acceptor, it was holden that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt. 1 B. & A. 1.

6. A. being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until next Michaelmas, and that then the property should be divided amongst them, the insolvent assigned his effects at the next Michaelmas; several of the creditors who have signed this instrument, agreed that the business should be carried on, by the trustees, for a further time. Held, that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action, the insolvent for a debt existing at the time of the first agreement. 1 B. & A. 46.

## DECEIT.

By misrepresentation.

1. An answer to inquiries respecting a third person's character and responsibility, that the party inquired of would give him credit for any thing he wanted, does not warrant or support so general an innuendo as that he (the person referred to) believed such third person was a man in good circumstances, and fit to be trusted with goods on credit. Nor will proof of such a representation of the character and circumstances of another without fraud, support an action for damages, although it was also proved that the person so spoken of had been then recently discharged under the insolvent act, and that the defendant knew it. 6 Price, 36.

2. The court arrested that justment after a second verdict given for the plaintiff in such a case, upon a new trial granted on the same objections, viz. that the innuendo was not warranted by the words, and

and that the action could not be maintained unless it were. 7 Price, 544.

3. If a person who is asked by a tradesman respecting the circumstances and credit of another, tells him that he has been paid a debt due to himself from such person, and that he was ready to give him credit for any thing he wanted: that representation would not be sufficient to support an action for a deceitful misrepresentation of such person's circumstances, whereby the tradesman was induced to give him credit, although such person had been before that time discharged under an insolvent act, and the defendant knew it, but did not mention it. Such a colloquium will not support an inuendo that a defendant means thereby that such person was in good circumstances, and fit to be trusted generally with goods on credit.

### DEED.

1. To debt on bond conditioned, that the defendant should not open a shop within a certain distance of premises demised to him by the plaintiff, the defendant pleaded the leave and licence of the plaintiff. Held, that such plea was bad on general demurrer. 8 Taunt. 31.

Relative to the discharge or alteration of.

2. By deed a mortgagee conveyed to the mortgager the legal estate, upon being paid the mortgage money, and the latter reconveyed it to trustees for the purpose of securing an annuity at the time of the execution by the mortgagee: there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgager, but several interlineations were made in that part of the deed after the execution by the mortgagee. It was held, that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. Held, also, that it was not incumbent on the plaintiff, in ejectment brought on this deed, to prove that the annuity was duly enrolled. Held, also, that the tenant in possession was not competent to prove that the witness, and not the defendant, was the possessor of the land. 4 B. & A. 672.

Relative to the avoidance of.

3. A deed of bargain and sale enrolled under the statute, held to have been rightly enrolled as of the day when it was brought into the enrolment office, although delivered to a porter in attendance there after office hours, and not minuted by the clerk, or, in fact, received by him till two days afterwards. The endorsement by the clerk of the enrolments of the day of the enrolment by way of date, is a part of the record, and cannot be averred against, nor is evidence admissible to show that it was enrolled on some other day, and that although the date be written on an erasure. 3 Price, 495.

Pleadings relative to.

### DEVISE.

1. Probate in the court of the archdeacon of *Sudberry*, to whom the bishop granted full power to prove the wills of all persons deceased within the archdeaconry, was held good, the testator having died within the said archdeaconry, although he was possessed of a term of years, in lands lying within another archdeaconry in the same diocese, 5 M. & S. 119.

Probate.

- Devisee.** 2. A devisee in fee may by deed, without matter of record, disclaim the estate devised. 3 B. & A. 31.
- Construction of.** 3. A. devised lands to G. H. the eldest son of J. H., for life; remainder to his issue; remainder to S. H., the second son of J. H., for life, remainder to his issue; remainder to J. H., the third son of J. H., for life; remainder to his issue; with diver remainders over. J. H. was the second son, and S. H. the third son of J. H. Held, that S. H. became entitled on the death of G. H. without issue. 8 Taunt. 306.
- Revocation of.** 4. A testator being angry with one of the devisees, named in his will, began to tear it with the intention of destroying it, and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a bystander, who seized his arms, and partly by the entries of the devisee: upon this he became calm, and having put by the several pieces, he expressed his satisfaction, that no material part of the writing had been injured, and that it was no worse. Held, that it was on these facts properly left to the jury to say, whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the court refused to disturb the verdict, and supported the will. 3 B. & A. 489.
5. Where a testator having devised copyhold lands to A. for life with different remainders over, and having surrendered them to the uses of his will, afterwards, in contemplation of marriage, conveyed his estates to their heirs to secure a jointure to his intended wife, and subject to a term of 99 years, for that purpose, to the use of himself in fee, and subsequently surrendered his copyhold lands to these uses. Held, that this did not amount to a total revocation of his will, but that the devisee took the copyhold land subject to the charge created by the settlement. 3 B. & A. 462.
- What passes with respect to quantity.** 6. A. devised all his hereditaments to his sister E. T. and to her daughters, A. S. and F. T. their heirs and assigns, equally to be divided between them as tenants in common, for and during the life of E. T. and after her death he devised the third part, "so devised to his sister for her life as aforesaid," to A. S. and F. T. in fee: held, that all the estate passed under his will, and that the daughters A. S. and F. T. took a fee in two thirds, with a remainder in fee in the other third part, after the death of the mother. 1 B. & A. 197.
7. Devise of all my *Briton Ferry* estate, and all the land, &c. of which it consists, and then all my *P. L.* estate, which, as well as my *B. F.* estate, lies in the county of G. Held, that the former devise was not confined in the county of G. but extended to all that was usually known by the name *P. F.* estate, although part of deviser's estate was situate in the parish of *P. F.* in the county of G. 1 B. & A. 550.
- What passes with respect to quality.** 8. A testatrix, after charging her estate with the payment of an annuity, devised the same to G. S. his heirs and assigns for ever; but her wish and desire was, that G. S. in his life time should convey the estate to some charitable uses, the choice of which was left entirely to his discretion, and, subject to this, G. S. was to enjoy the estate to his own use for his life. Held, that this was a devise void by 9 G. 2. c. 36. by which act, the estate given, and not merely the trust, was made void, and that the legal estate upon the death of the deviser for life, descended on the heir at law. By the codicils of the will certain legacies bequeathed, charged upon the estate, and a power was given to G. S. (who was also named executor) to cut down timber to pay them, and interest was directed to be paid by him to the legatees after the expiration of two years. Held, that the personal charges could

could not raise by implication the express estate for life, given to G. S. by the will, into an estate in fee. 2 B. & A. 711.

9. Where a testator bequeathed all his houses and premises in W. to his wife for life, and at her decease to go to his eldest son, or surviving sons, and in lack of sons, to daughters, and his copyhold land at L. to his eldest son, and in case of his decease to the eldest, and so on in rotation, and in lack of sons to daughters, and directed his personal property to be equally divided among the remaining children: held, that the son, who at the death of the testator, was the eldest under the will, and as heir at law, took a fee in the premises at W. subject to his mother's life estate, and a fee in the copyhold land at L. 4 B. & A. 574.

10. A devise of "my freehold estate, consisting of 30 acres of land, more or less, with the dwelling house, and all erections on the said farm, situated at *Sudbury Harrow*, in the county of *Middlesex*," passes an estate in fee simple. 1 B. & B. 72.

11. A devise to H. H. for life, and from and after her decease to such child or children of her body, "as shall be living at her decease; and in case she shall have no such child or children living at her decease, or such child or children shall happen to die before he, she, or they, shall attain the age or ages of eighteen years, or be married," devise over to a stranger in fee. Held, to give to the child of H. H. who should survive the mother, a fee simple notwithstanding there being no words of inheritance in the devise. A fine *sur cognizance de droit*, levied by the husband of one of the daughters of H. H. to the husband of another of her daughters, to the use of the husband of the former, in pursuance of a feoffment with livery of seisin indorsed, is not of itself a bar by estoppel to a recovery of the premises by the other daughter of H. H. in an action of ejectment, against persons claiming under the conusee. 6 Price, 179.

12. Devise to trustees, their heirs, executors, administrators, and assigns in trust, to let the freehold estate for any term they thought proper, at the best improved yearly rent, to pay one-third of the rents of the freehold estates to his wife for life, and one-third of the personalty to her absolutely, and then to lay out the other two-thirds of the personalty in the funds, and to pay the dividends and the rents of two-thirds of the freehold estates, and after the death of the wife, the other third of the rent of the freehold estate to his daughter for her own separate use, and after her death, the freehold estates and two-thirds of the personal estate to the daughter's children, to be equally divided amongst them, and to be paid them at the respective ages of twenty-one years; and if his daughter died, without leaving issue, then his freehold estates to his wife for life, and after her death to his heir at law, as if he had died intestate. Held, that the trustees took in estate in fee, and upon the death of the widow, who was the surviving trustee, the legal estate descended to the daughter, and upon her death without issue, vested in the heir at law *ex parte materna*. 2 B. & A. 84.

13. Devise of the interest of all my land property, whether houses, bank stock, or cash, after discharging my debts, to my wife, and after her demise, to my brother W. for life, but not to cut, fall, or destroy any thing of the estate; and after his decease, into my sister C.'s family, to go in heirship for ever. Held, that the real estate passed in entirety to the eldest son and heir of C. in fee. 5 M. & S. 126.

14. A testator devised a particular estate by name to T. W. his heir at law, and then devised to H. W. all the residue of his lands to

be kept in the name and family of the *W.*'s as long as can be: held, that *H. W.* took an estate of inheritance. 1 B. & A. 518.

*Estate tail.*

15. Devise to *W.* one of the sons of my sister, *A. W.* before marriage, from his natural, and from and after his decease to the heirs of the body of *W.* lawfully issuing in such shares as *W.*, by deed or will, shall appoint, and for want of such appointment, to the heirs of the body of *W.* lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such child, and for want of such issue, to my right heirs for ever: held, that *W.* and his children, who were born after the death of testator, took only estates for life. 5 M. & S. 95.

16. Devise to *M. H.* her heirs, &c. for ever; and in case *M. H.* shall happen to die and leave no child or children then to *J. B.* and her heirs for ever, paying the sum 1000*l.* to the executor, or executors of *M. H.* or to such persons as *M. H.* by her will shall appoint; held, that the words "child or children" were here synonymous with "issue," and that this was not the devise of an estate tail to *M. H.* but of an estate in fee to *M. H.* with a good executory devise over to *J. B.* in case *M. H.* died leaving no issue living at her death. 1 B. & A. 713.

17. "Trust as aforesaid." Held, that the trustees and the survivors and survivor of them, and the heirs of the survivor, took only an estate for the life of the daughter in the remaining estates at *F.* and elsewhere. 3 B. & A. 537.

*Estate for life.*

18. A testator by his will devised all his real estates in several parishes, to trustees, their heirs and assigns for ever, upon trust to sell his estate at *H.* to pay his debts, and in case it should not be sufficient then as to his estate at *F.* upon trust, to sell that also to make good the deficiency; but in case it should not be necessary, then as to his estate at *F.* and his other remaining estates in trust to receive the rents and profits, till his daughter came of age, and then to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at *F.* if it should be sold, to his daughter, upon coming of age, and from that period, to the use of the trustees, for the life of his daughter, and after her death to the use of her children; and by a codicil to his will, in which he made an alteration as to the trustees, the testator devised his estates to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor, "such estates as aforesaid in devise of certain freehold and copyhold lands, and messuages at *H. W.* and *S.* to trustees, to the use of devisor's daughter, *E. A. P.* for life, and after her decease, then to the use of the issue of her body, lawfully begotten, and in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then as to the lands at *H.* over to devisor's brother, *S.* for life, and after his decease, then to the use of the heirs of his body, and in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then to devisor's brother, *H.* for life, and after his issue, then to devisor's sister *E.* her heirs and assigns for ever; and as to the lands at *W.* upon the death of *E. A. P.* without issue, or if issue, they should not live to attain the age of twenty-one years as aforesaid, to his brother *H.*, his heirs and assigns, and after the death of *E. A. P.* without issue as aforesaid, all the messuages at *S.* to his sister *E.*, her heirs and assigns. Held, that *E. A. P.* took an estate for life in the premises. 1 B. & B. 484.

*Estate execu-*

19. Devise to *B. F.* (having no children at the time of the testator's death)

death) for life; remainder to the "second, third, fourth, and all and every other, the sons of B. F. (except the first or eldest son)" successively in tail male, with remainder over to F. S. his contingent only till B. F. have two sons born both living, not till his death. As soon as B. F. had two sons *in esse*, at the same time, it then became vested, not to be divested by any subsequent changes in the family of B. F. Therefore where B. F. had several sons, some of whom were *in esse* together, and they all afterwards died without issue, except the youngest, who alone was living at the father's death, such son was held, not to be the first or eldest son, within the meaning of the exception introduced into the devise: for he took a vested interest in remainder, when he became the second son of his father, (living an elder son) which interest would vest in possession on his father's death, notwithstanding he should then have become his father's only son living, by the death of his brothers, for their death did not divest his vested interest. The exception introduced into the will does not afford such a plain indication of the testator's intention that the devise should pass from a younger son of B. F., in the event of his becoming the eldest or only son, as to give it that effect in legal construction. 6 Price, 41.

20. A testator, having three sons, devised as follows: I leave the *Withy Stakes Farm*, with the appurtenances, to my two youngest sons, *John* and *George*, equally between them, share and share alike; and I entail the said farm on the male heirs of *John* and *George*, being born in wedlock, there being no devise over it. Was held, that cross remainders could not be raised by implication, and that on the death of *George*, without issue, his moiety went to the heir at law. 3 B. & A. 425.

21. One devised to his daughter, then under age, an estate in fee, and if she died under the age of 21 years unmarried, and without leaving lawful issue, then to his wife in fee; the daughter married and died under the age of 21 years, without issue, but left her husband surviving her. Held, that the devise over did not take effect, as, by the words of the will, it was made to depend on the happening of the three events, dying under 21, dying under that age unmarried, and dying under that age without issue. 2 B. & A. 441.

## DIEM CLAUSIT EXTREMUM.

1. Proceedings by prerogative process are not within the 4 Anne, Proceedings. c. 16. notwithstanding the 24 sect. 5 Price, 621.

2. Plea by an executor of money paid for expences of his testator's funeral, and for proving the will amounting to 70*l.* and no assets except, &c., which were not sufficient to pay and satisfy said expences. Held bad, as against the crown on a writ of *diem clausit extremum* against the estate of the deceased crown debtor, on general demurrer, such a plea, not being perfect either as a plea of retainer or *plene administravit*, or issuable in that form, and wanting necessary averments as that the sum laid out as alleged was reasonable, and that the executor had retained his own debt. 5 Price, 621.

3. The statute of limitations may be pleaded to a *scire facias* issued by the crown against the drawer of a bill of exchange in the hands of the crown debtor, and which has been seized by the sheriff under an inquisition on the prerogative process. Such a plea held good on demurrer. 6 Price, 24.

## DISSEISIN.

- What is not. 1. A lease by a stranger, and entry by the lessee, is not a disseisin in fact, without an entry by force or an avowed intention to disseize. 3 Price, 575.
- Miscellaneous. 2. A previous deed operates by way of *estoppel*, by matter in writing, against a subsequent act of disseisin. So does acceptance of rent by matter *in pais*. 3 Price, 602.

## DISTRESS.

- For rent. 1. If a landlord distrain *inter alia* his tenants' cattle and beasts for the plough, for rent arrear, and it turn out after the sale (judging by the result) that there would, in point of fact, have been sufficient to satisfy the rent due and expences, without taking or selling them, such a distress is not thereby proved to be an illegal distress, and contrary to the statute 51 H. 3., if there were reasonable grounds for supposing (from the appraisement of proper and competent persons, made at the time of the taking,) that, without taking the beasts of the plough, there would not have been sufficient to have satisfied the rent and expences when sold. *Seemle*, that there is no order required by law to be observed on the sale of such goods, as that the beasts of the plough should be postponed to other good; nor is it therefore a cause of action that the beasts of the plough should be sold before the other goods are disposed of, where the distress itself was not wrongful. 6 Price, 3.
2. The stat. 11 G. 2. c. 19. empowering landlords to follow goods fraudulently and clandestinely carried off the premises within thirty days, applies to the goods of the tenant only, and not to those of a stranger; wherefore a plea, justifying the following goods off the premises, and distraining them for rent arrear, must shew that they were the tenant's goods. 5 M. & S. 98.
3. A reasonable time, after the expiration of five days from the time of distress, is by law allowed to the landlord for appraising and selling the goods distrained. 4 B. & A. 208.
4. A tenant whose standing corn and growing crops have been seized as a distress for rent, before they were ripe, cannot maintain an action upon the case, under 2 W. & M. s. 28. c. 5. against the landlord or his bailiffs for selling the same, before five days or a reasonable time have elapsed after the seizure, such sale being wholly void. 3 B. & A. 470.
5. If a tenant, on whom his landlord have distrained for rent, give a promissory note for the amount, jointly with another person, to release his goods, and a subsequent distress be made on him for arrears of rent accruing due after the period to which the note referred, the produce of the sale of such latter distress must be applied in discharge of the note. The landlord cannot apply it in discharge of the subsequent rent, and then sue the person who joined in giving the note for the former rent. 3 Price, 572.
6. Action for use and occupation. Plea that plaintiff, before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same. Held, on special demurrer, that this plea was bad, for not shewing that the rent was satisfied. 1 B. & A. 157.

## EJECTMENT.

1. If one of two tenants in common of reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it. 1 B. & A. 85. Relative to entry.
2. Where a long period had elapsed after judgment signed, and no delays had been interposed by the defendant in the mean time, the court will not permit the term in the declaration of ejectment to be enlarged for the purpose of the plaintiff's suing out a *scire facias*, in order to revive the judgment and take out a writ of possession. 2 B. & A. 773. Relative to the declaration.
3. A patent for improvements in the construction of ship's anchors, windlasses, and chain cables, cannot be supported, unless there is novelty in each invention; and therefore, where it turned out that there was no novelty in the construction of the anchors, it was held that the patent was wholly void. 4 B. & A. 541. Relative to the appearance.
4. The court will not stay the proceedings in an ejectment until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, are paid. 3 B. & A. 602. Of staying and setting aside proceedings.
5. Where a defendant, on being served with a declaration in ejectment, assented to the character of tenant in possession, and afterwards appeared and pleaded; held, that it was quite sufficient evidence for a jury to find that he was the tenant in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner on the premises. 2 B. & A. 371. Between landlord and tenant.
6. The court refused to set aside the verdict in ejectment, on the ground that there was a variance between the description of the premises in the *Nisi Prius* record (upon which the plaintiff recovered) and the issue, it not being stated how the premises were described in the declaration delivered. 2 B. & A. 472. Miscellaneous.

## ERROR.

1. A plaintiff in error in the Exchequer Chamber is not confined to the taking out one rule in each term, but may proceed as quickly as he pleases. 1 B. & B. 514. Of proceedings in error.
2. This Court will not reverse a judgment of the Courts below, merely on the ground of the defendant in error not appearing, without going into the errors assigned. 4 Price, 46.
3. Several years having elapsed after judgment obtained, plaintiff brought an action upon the judgment, after judgment had been signed. In this action, the defendant sued out a writ of error upon the first judgment. Held, that the plaintiff might, notwithstanding, take out execution on the second judgment. 3 B. & A. 275. When a supersedeas, and of what.
4. Service of notice of the allowance of a writ of error (bail in error not having been put in), on the tipstaff having brought the defendant in custody into court (where the notice of the allowance of the writ was tendered to him), for the purpose of his being charged in execution, is not sufficient to give it the effect of a supersedeas, so as that the defendant may apply for his discharge after having been charged in execution. It should also be served on the plaintiff's attorney. Had bail in error been perfected, it might have been ground for a special application to the court to discharge the defendant out of custody. 4 Price, 289.

5. The

5. The defendant's bail in error ought to have justified on the 26th November; but, being too late, the court permitted them to justify on the 27th. A *habeas corpus*, returnable on the 27th, had issued to the Warden of the Fleet to bring up the body of the defendant, in order to charge him in execution; but the court held, that the operation on the *habeas corpus* was suspended by their permission; and bail having justified, in pursuance of such permission, discharged the defendant. 8. Taunt. 126.

6. Where defendant, a prisoner, after the issuing the writ of *habeas corpus* for bringing him up to be charged in execution, issues out and obtains the allowance of a writ of error, he cannot be charged in execution, but must be remanded to his former custody. 1 B. & A. 676.

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### ESCAPE.

On mesne process.

1. An attachment for non-payment of money, is in the nature of *mesne* process, and where the party had been taken, and permitted to go at large, and returned again into custody, and continued in custody at the return of the writ, it was held, that the sheriff was not liable to an action for an escape. 2 B. & A. 56.

2. The sheriff having a writ against *G. B.* arrested *M. B.* who was the real debtor, and at the time of contracting the debt, had represented himself as *G. B.* Held, that the sheriff having been informed of these circumstances while he had the real debtor in his custody, was not bound to detain him, and therefore that an action would not lie against him for an escape. 1 B. & A. 647.

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### ESTATE.

Relative to the limitations of.

1. Where *A.*, in a conveyance to uses, settled an estate for life on himself, and remainder in tail to his issue, with an ultimate limitation to the heirs of *R. S.* in fee, and at the time of the settlement, *A.* was himself the right heir of *R. S.* Held, that this ultimate limitation was void, and the estate of *A.* without issue descended on his heirs general. 2 B. & A. 625. Held, also, that it was not competent to go into the intention of the settlor apparent from the recital, in order to explain the words of this limitation, they being words of plain and well known import. Ibid.

Relative to conditions annexed to.

2. *A.* being possessed of a term of years, demised his whole interest to *B.*, subject to a right of re-entry on the breach of a condition. Held, that *A.* might enter for the condition broken, although he had no reversion. 2 B. & A. 168.

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### ESTOPPEL.

When the truth appears.

A verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence to go to the jury. 2 B. & A. 662.

EVIDENCE.

## EVIDENCE.

1. The fact of a tenant for life, not having been seen or heard of for fourteen years, by a person residing near the estate, although not a member of his family, is *prima facie* evidence of the death of the tenant for life. 4 B. & A. 433. Presumptive.

2. Evidence of deficiency in a fish curer's stock of fish salt, and of his cart being found in the act of carrying salt from his herring hang under a misrepresentation of the contents, and other suspicious circumstances, having been left to the jury to say whether he had delivered salt to a person not being a fish curer, contrary, &c. Held, to have been properly so left, and to be sufficient to sustain a verdict for the crown on such a charge. 4 Price, 237.

3. The law always resumes against the commission of crime, and therefore where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him. Held, on appeal, that the sessions did right in presuming *prima facie* that the first husband was dead at the time of the second marriage, and that it was incumbent on the party objecting to the second marriage, to give some proof that the first husband was then alive. 2 B. & A. 386.

4. In the proof of a pedigree, the dying declarations of A. as to the relationship of the lessor of the plaintiff to the person last seized are not receivable in evidence. 4 B. & A. 53. Hearsey.

5. An entry in the public books of a corporation, is not evidence for them, unless it be an entry of a public nature. 3 B. & A. 142.

6. Where on trespass for pulling down a wall, the issue was, whether certain common land was the soil and freehold of the lord of the manor, on which the plaintiff was entitled to a right of common or the soil and freehold of the plaintiff. Held, that leases of minerals, &c. granted by the lord to other persons in other parts of the uninclosed waste land were not receivable in evidence, unless it was first shown that the *locus in quo* formed part of one entire waste, to which those leases were applicable. 2 B. & A. 554. Held also, that the effect of such leases, if received, would only be to prove that the lord was entitled to the minerals under the *locus in quo*, and not to the surface. *Ibid.*

7. On an appeal, the respondents, in order to prove the fact of the delivery to them of a certificate given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the hand writing of a former parish officer. Held, that such evidence was inadmissible. 2 B. & A. 185.

## EXCISE AND CUSTOMS.

1. Plea of *scire facias* on bond, conditioned to take out the bonded goods within the year, or pay the duties at the end of the year; that the defendant had paid, and did pay, the duties answering to the tenor and effect of the writing obligatory: republication that the goods were not taken out of the warehouse within the year, and that the duties were not paid at the end of the year. Rejoinder, that the duties were paid after the end of the year, and before the issuing of the *scire facias*. The rejoinder held bad on demurrer. 6 Price, 174. Bonding goods.

2. The

Of informations  
for offences con-  
nected with.

2. The court will not order a bill of particulars of the charges meant to be relied on to an information for arrears of duties to be furnished by the attorney-general, or other officer of the crown, or any measure of a similar nature, although the charges cover a space of thirty years, and the defendant have conducted his business at two separate brewhouses, at a distance of 20 miles from each other at least, unless the defendant furnish the most satisfactory ground for such an application. 5 Price, 386. The court will not suffer an application of this nature to stay the trial, and in the present case they permitted the attorney-general, notwithstanding a rule was granted to show cause, to give notice of trial in the mean time. *Ibid.* *Quære*, whether on a strong case satisfactorily made out, the court would not interfere on a qualified application to assist a defendant to a certain extent? *Ibid.*

Of convictions  
for offences  
connected with.

3. No appeal lies to the sessions from a conviction for selling ale without an excise license, under 48 G. 3. c. 143. s. 5. 4 B. & A. 519.

### EXECUTION IN CIVIL CASES.

Priority of.

1. Two writs of *fi. fa.*, at the suit of different plaintiffs, were issued against one defendant; the goods were not more than sufficient to satisfy the first execution; the officer under the second writ continued in possession until the goods were sold by the sheriff; the defendant then obtained a rule for setting aside the first execution, and pending that rule there were conferences between all the parties: the rule, however, was made absolute, and the sheriff was ordered to pay to the defendant the proceeds of the levy; the sheriff having so paid the money, without having applied to the court for relief, and without having given any notice to the plaintiff; in the second execution was held, liable to him for that amount in an action for a false return of *nulla bona*. 3 B. & A. 95.

Of staying  
execution.

2. The court will not interfere to stay execution on a judgment recovered in trover against a defendant, till the plaintiff shall do any act however reasonable to make the defendant a title to the subject matter of the action: they have no jurisdiction to do so. A rule for that purpose discharged with costs. 4 Price, 291.

Relative to the  
*ca. ad. sc.*

3. Where a defendant taken on a *ca. sa.* is discharged out of custody, by consent of the plaintiff, the debt itself is extinguished, and therefore a promise by a third person to pay that debt on condition, or that discharge is an original promise, and not within the 29 Car. 2. c. 3. s. 4. 1 B. & A. 297.

Relative to the  
*fi. fa.*

4. Where *A.* mortgaged land with a wind-mill on it, built chiefly of wood; the deed containing also a bargain and sale of the mill: held, that it could not be taken in execution by a creditor of *A.* though *A.* remained in possession. 1 B. & B. 306.

5. The statute 56 G. 3. c. 50., although passed for the purpose of general good, and public benefit in promoting good husbandry, does not extend to bind the crown: therefore sales of goods seized under prerogative process are not within it, and the sheriff must sell unconditionally. Nor can the sheriff sell crops as subject to tithe, he must sell without any qualification. 6 Price, 94.

6. The sheriff under a *fi. fa.* seizes a lease, and sells the term before the writ is returnable, but does not execute the assignment to the vendee till a subsequent period. Held, that this was a valid assignment. 1 B. & A. 230.

7. A trust created by a defendant in favour of himself, and another person, is not a trust within 29 Car. 2. c. 3. s. 10., that clause being confined to cases where the trustees are seized or possessed in trust for a defendant alone, and not jointly with another person. 4 B. & A. 684. Relative to the  
elegit.

8. The sheriff's return to an *elegit* stated that he had delivered an equal moiety of an house. Held, that this return was void for not setting out the moiety by the *metes* and bounds, and that the objection might be taken at *nisi prius* to an ejectment brought upon the *elegit*. 1 B. & A. 40.

9. A writ of extent binds from the teste, and such property as bills of exchange, is bound, while in the custody of the debtor. 5 Price, 428. Relative to the  
extent.

10. A special indorsement does not transfer property in bills of exchange till delivery. 5 Price, 428.

11. It is the sheriff's duty, on an immediate extent, to seize goods which have already been taken in execution under a *fiery facias* at the suit of a subject if not actually sold, although the judgment on which *fiery facias* issued, was not only obtained, but the goods had been seized under it before the crown process was sued out: the provision of the latter part of 74 sect. of the 33 H. 3. applying, as this court holds, only to cases where the goods of the debtor are not only taken in execution but sold, the property in them not being altered till then, and that until the property be altered and transferred absolutely from the debtor by sale and delivery, the crown's execution is to be preferred, even where process is awarded after, &c. (as above). 6 Price, 114.

12. A factor to whom goods have been sent for sale, and who has accepted bills of exchange drawn on him by his principal to the amount of their value, has a lien on such goods, and the purchase-money, available against the crown, where the goods or money have been seized by the sheriff under an extent against the principal for a debt due to the crown. 6 Price, 869.

13. The court will not grant a new writ of extent, the date of the former tested several years before (between eight and nine in this case), on the ground that the defendant has been since found to be further indebted to the crown, and to have had at the time of issuing, the first extent property, not then known to belong to him, and though his goods and chattles seized and sold under that writ, produced only as much as would satisfy but a very small part of the owner's original debt. But a new writ of present teste should be issued, which may be done at any time on application to a baron, where, while the crown debt be unsatisfied, the defendant becomes possessed of newly-acquired property. 7 Price, 238.

14. Where goods had been seized under a *fiery facias*, part of them sold on *Saturday*, and the remainder on *Monday*; an extent tested on the *Monday* was put into the sheriff's hand at six o'clock after the goods had been delivered to the purchasers, and the money received by the sheriff. Held, that the execution was executed, and that the party who issued the *fiery facias* might recover of the sheriff, in an action for money had and received, the money levied under the sale. 1 B. & B. 370.

15. Where orders have been sent by an insolvent merchant, to his agents abroad, to hold balances in their hands at the disposal of certain persons named by him, who are, in point of fact, appointed trustees for his general creditors by a deed, termed a deed of inspection,

tion, in which he relinquishes all claim to his business, but agrees to conduct it to the winding up on their account as their agent. Held, not to protect bills of exchange transmitted by such foreign agents, made payable to the insolvent, to satisfy balances due to him in their hands, from a creditor not a party to the deed, on whose behalf the sheriff has seized the bills, under an extent whilst in his possession, and undorsed against such a proceeding resorted to after the arrangement, although the foreign agents have acceded to such arrangement, because, for want of a specific appropriation of the bills, and an express consideration *quoad* those particular bills being shown to have been the foundation of their being assigned to the trustees, and they were held to be the property of the insolvent merchant, notwithstanding the arrangement, and therefore lawfully seized. 4 Price, 258.

16. A parcel made up by a banking house, sealed and addressed to another banking house, containing cash notes and cheques of the latter, and bills of exchange, specially indorsed to the former, to make up a balance due from them on their general account, and deposited on the 3d July, after the bank was shut with a woman servant left in care of the banking house, to be given to the postman in the morning of the 4th, who was in the habit of calling for such parcels before banking hours. Held, to be seizable under an extent in aid, tested 2d July, returnable 6th of November, on special demurrer to a plea stating those facts, and tendering issue on the property, and that although the inquisition finding the debt due to the debtor of the crown, debtor was not taken till the 4th of November following. Because such circumstances do not amount to a delivery of the parcel to the persons to whom it was addressed, or their agent, and therefore confers no right of property. *Aliter*, if delivered to the postman. 5 Price, 428. The contents of such a parcel while remaining in the banking house under such circumstances, remain there at the risk of the bankers who made it up, and is still subject to their control. *Ibid*. It is sufficient, in such a case, if the defendant traverse the property in the debtor, to the crown's debtor 'at the time of the seizure or of taking the inquisition,' and it is not necessary to say, "at the time of the issuing of the extent. *Ibid*.

17. Where the crown debtor has debts due to him jointly with others who are not debtors to the crown, and would therefore not be entitled to the crown process, an extent may issue for such joint debts. 5 Price, 447.

18. The doctrine of the crown process having priority where it bears teste on a day subsequent to a subject's execution on a *f. fa.* under which the sheriff has seized, applies to bases of extents in aid. 6 Price, 144.

19. The statute 59 G. 3. enacting that extents in aid shall not be sued out and prosecuted in certain cases, does not extend to the prosecution of such extents where they have been commenced before the passing of that act. 6 Price, 144.

20. Bankers having money in their house arising from the assessed taxes paid in for the purpose of being paid over to the exchequer on account of a receiver-general, for the due payment of which, by him, they have given bond to the crown, are still entitled to sue out an extent in aid, and that upon affidavit, stating generally their having received the money for that purpose; nor is it necessary that they should show by allegations in the affidavit made to obtain the *fiat*, that they are not precluded by the 57 G. 3. from using the crown process.

cess, as that, being sureties, they have been called upon by the crown on account of the default of their principal, or in any other respect. 7 Price, 633.

21. The court on application of claimants will, by rule to show cause, order a *vendit exponas* to issue before the due time arrive for selling the goods of a bankrupt, seized under an extent, on an affidavit that it would benefit the bankrupt's estate, because the price is expected to fall, &c., the sheriff to pay the prosecutors' demand into the hands of the deputy remembrancer to the credit of the cause, and the remainder to the assignees, the defendant's (the claimant's) paying into court 100*l.* beyond the amount of the debt claimed by the prosecutor. 3 Price, 606.

22. A defendant in an extent having moved to quash it on facts stated by affidavits which are satisfactorily answered, whereon a *validationi exponas* issues, will not afterwards be permitted to enter a claim and traverse the inquisition. 4 Price, 323.

23. Where defendant's effects have been sold under a *validationi exponas* on an extent in default of claim, it does not conclude his assignees under a commission of bankruptcy; and they will be allowed, on application to enter their claim and plead in a proper case where the proceedings have gone so far on payment of costs of the sale and the application, and putting the prosecutors of the extent in the same situation as if they had claimed and pleaded in due time. 5 Price, 39. A short delay (as a month) is not laches in the case of assignees. *Ibid.*

24. Where an extent had issued in aid of a company of individuals (not incorporated) and the inquisition found that their debtor "was indebted to *L.* and *H.* (two of the company, who had executed the usual bond to the crown, as taken from joint insurance companies under the 22 G. 3. c. 48. on behalf of themselves and the company), and the other partners and proprietors of a certain society called, &c. Held, sufficient on motion in arrest of judgment, and that it was not a fatal objection not to have named all the members of the company in the finding of the debt by the inquisition. Nor is a finding that two persons were indebted to *L.* and *H.*, and the other partners and proprietors of the unincorporated company, at variance with a command to the sheriff, to find what debts are due to *L.* and *H.* on behalf of themselves and a certain society called, &c. 5 Price, 447.

25. A recital on a writ of extent, that two persons are indebted to the crown by bond (generally) is sufficient to authorize a command to the sheriff to enquire of debts due to such two persons on behalf of themselves, and a certain society called, &c. 5 Price, 447.

26. In an inquisition on the extent in aid, it is sufficient that the prosecutor of the extent be found to be indebted to the crown (generally) at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accrual. And, therefore, if an inquisition find the crown debtor indebted in a *secus* certain for duties, &c. due between two given periods, and on the trial of a traverse of the crown's debt *modo et forma* it be proved, that the debtor was indebted at the time of the inquisition, in a different sum, for duties accruing for a different period, it is not a fatal variance, because the allegation of the amount of the debt, and of the period for which it was due, is not of the substance of the issue, and may be rejected as surplusage. It is enough if there be any debt in fact due to the crown at the time of taking the inquisition to sustain the proceedings for the being indebted to the crown on the basis of the extent. 5 Price, 614.

27. The

## EXECUTOR AND ADMINISTRATOR. [ADDENDA.]

27. The court will not give judgment as if the plea were confessed for defendants, (claiming as assignees, the goods of a bankrupt seized under an extent) on motion for that purpose, where the attorney-general has not demurred, replied, or otherwise proceeded. 6 Price, 480. *Semble*, however, they would grant a writ in *amoveas manus* in such a case. *Ibid*.

28. An inquisition taken on a writ of extent, finding *A. B.* indebted to *C. D.* and the other partners and proprietors of a certain society or company, called the *Kent Insurance Company*, is sufficiently certain without naming the individual members of the company, and although they are not incorporated. Judgment of the court of exchequer, in the case of the *King v. Ramsbottom* (ante, vol. v. p. 447.) affirmed, 7 Price, 570.

29. A defendant taken into custody under an extent in aid (the sheriff having also seized his property, being more than sufficient to cover the demand) ordered to be discharged. Where his property (seized and returned) is ordered to be restored to him, on his giving approved security, and it is delivered up by the sheriff before the security be approved, the remedy must be against the sheriff, for not having the property forthcoming against the party for not giving such security. 3 Price, 596.

## EXECUTION IN CRIMINAL CASES.

*Levari facias.*

Where a defendant in an indictment for a misdemeanor, has received judgment of fine and imprisonment: Held, that a *levari facias* may issue immediately to take his goods in execution for the fine. 2 B. & A. 609.

## EXECUTOR AND ADMINISTRATOR.

*Rights of.*

1. *A.* being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenants to pay the firm all his then debts, and such other debts as should subsequently accrue. *A.* dies without having satisfied the original debt, and having contracted further debts subsequent to the execution of the deed. Held, that his executors, two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specifically debt. 1 B. & A. 664.

*Assets.*

2. One of two executors, having alone proved the will, had received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereof, and afterwards permitted the money to be lent out to a third person, by whom it was paid to *A. A.*, on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grandchildren, but refused to pay it over to the executor. Held, that both executors might join in an action brought to recover the money against *A.* Held, also, that it does not amount to a devastavit if an executor lends out, on private security, money belonging to the testator, but not wanted for the immediate uses of the will, provided he exercises a fair and reasonable discretion on the subject. 3 B. & A. 360.

*Declaration.*

3. Counts on promises made to an intestate may be joined in a declaration

claration by an administrator in an action of assumpsit on such promises, with counts on promissory notes, given to the administrator since the death of the intestate, as administrator, because the amount, when recovered, would be assets in the hands of the administrator. *Semble secus*, if a bond, or other higher security, had been given because the effect of such new and higher security would be an extinction of the simple contract debt. Counts on promises made to an intestate, may be joined with counts on promissory notes, given to the administrator, as administrator, since the death of the intestate, because, when recovered, the amount would be assets. Judgment on that ground affirmed in error. 7 Price, 591.

4. A count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife as administratrix for use and occupation by them after the death of the testator. 3 B. & A. 101.

5. An administratrix, claiming under a marriage settlement to retain her debt, need not, in pleading the articles to an action brought against her for a simple contract debt, due from the intestate, state that they were in writing, or under seal to plead them with a *pro fert*, or set out the consideration more particularly, the object of such a plea being merely to show her right to retain a debt accruing to her thereby against other creditors of equal degree, and to let in evidence in support of such retainer on the plea of *plene administravit*. 4 Price, 89. Plea.

6. In avowing as executor or administrator under the stat. of 32 Hen. 8. c. 37. s. 1. it is not necessary for the defendant to state what term the tenant held the premises. *Quære*, whether the stat. 32 Hen. 8. c. 37. applies to rents arising out of terms for years. 8 Taunt. 159.

7. Where the bailiff of an executrix made cognizance in replevin for arrears of rent incurred in the lifetime of the testator, and a verdict was found for the defendant, the court would not permit the plaintiff to enter up judgment *non obstante veredicto*, on the ground, that the record did not show the executrix to be entitled to distrain under the 32 H. 8. c. 37. s. 1. 1 B. & B. 279.

8. Plaintiffs sued as executors for the balance of an account due to the testator, and it appearing, at the trial, that the balance claimed arose out of matters of account between the plaintiffs, in their own right as surviving partners of the testator, they were nonsuited. Held, that the court had no power to order the defendant to have his costs allowed him as costs in the cause. 3 B. & A. 213. Costs.

9. A plaintiff suing as executor having been appointed under a former will, which the testator had afterwards revoked, and having obtained probate surreptitiously of the first will, which was soon after annulled by the prerogative court, who also revoked the probate on that ground after the action commenced, held liable to the costs of the cause. 7 Price, 709.

10. Where plaintiff sued as executor, and was nonsuited upon evidence being given at the trial that the supposed testator was still alive, the court refused to allow costs to the defendant, it appearing from affidavits on both sides to be still at least doubtful whether the supposed testator were living or not. 1 B. & A. 386.

## FELONY.

Disabilities incurred by.

1. By attainder all the personal property and rights of action, in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found, and therefore attainder may be well pleaded in bar to an action on a bill of exchange, indorsed to the plaintiff after his attainder. 2 B. & A. 258.

2. A copyhold of inheritance is not forfeited by a conviction of felony without attainder, unless there be a special custom in the manor. 3 B. & A. 510.

3. By the word transportation in the 8 G. 3. c. 15. is meant, not merely conveying the felon to the place of transportation, but his being so conveyed, and remaining there during the term for which he is ordered to be transported; and, therefore, a felon attainted is not by that stat. restored to his civil rights till after the expiration of the term for which he is ordered to be so transported. 2 B. & A. 258.

Miscellaneous.

4. The record in case of felony at the quarter sessions, after stating the indictment plea of not guilty, and verdict of guilty, thereon added, that because it appeared to the justices that after the jury had retired, one of them had separated from his fellows, and conversed, respecting his verdict, with a stranger, it was considered that the verdict was bad, and it was, therefore, quashed, and a *venire de novo* awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, and the trial and conviction by the second jury, whereupon all and singular the premises being seen and considered, judgment was given, &c. Held upon a writ of error brought, that the judgment was right. 4 B. & A. 273.

## FINES AND RECOVERIES.

Of the writ of entry.

1. In a recovery the demandant died before the return of the writ of *seisin*; the acknowledgment was taken at the Cape of Good Hope, on June 9. 1817, and the writ of *dedimus potestatem* was tested on the 16th January, 1817. The court refused, on application, to make the writ of entry returnable in one month of Easter, 1817. The writ of summons returnable in three weeks of the Holy Trinity following, to allow the tenant's appearance to be recorded as of Trinity term, 1817, and the recovery to pass as of that term. 8 Taunt. 104.

Relative to the warrant of attorney.

2. Recovery permitted to pass where the warrant of attorney did not state on what plea of land it was intended to operate, it being evident, from the caption, for what purpose the attorneys were appointed. 8 Taunt. 164.

3. Recovery allowed to pass where the warrant of attorney was "put in the place of *A. B.*, on a plea of land," the words "to gain or lose" being omitted in the warrant of attorney. 8 Taunt. 164.

4. The court will not direct its officer to pass a recovery where there is a mistake in the form of the warrant of attorney. 8 Taunt. 167. Nor will it permit the same mistake to be rectified by amending the warrant of attorney. Ibid.

By a feme covert.

5. The affidavit of the consent of a *feme covert* ought not to be separate. 1 B. & B. 468.

6. The

6. The court will not entertain motions on the subject of fines and recoveries the last day of term. 1 B. & B. 468. Rules relative to.
7. The court refused to pass a fine where the affidavit, taken before a commissioner abroad, was written on paper. 1 B. & B. 472. Levied or suffered abroad.
8. Return-day of the writ in a recovery, returnable in the last term, amended, and the recovery allowed to pass as of the present term. 8 Taunt. 197. Amendment of.
9. Where the *præcipe* in the vouchee's warrant of attorney in recovery rightly described the parties to the plea, but the body of the warrant of attorney expressed that the vouchee appointed his attorney to gain or lose in a plea of land against the tenant, instead of the demandant, the court refused either to amend the warrant of attorney, or to suffer the recovery to pass, and to construe the latter clause as repugnant and inoperative. 1 B. & B. 92.
10. Fine amended by insertion of a name not known to belong to the consor at the time of passing the fine. 3 Taunt. 20.
11. Recovery amended by inserting an omission in the name of the vouchee. 8 Taunt. 27.
12. Affidavit of husband and wife, that they both did appear at the bar. The officer said that he had written the names of the husband, but the name of the wife appeared struck out in the *præcipe*, an act which the officer said he never did. The fine being only of the last term, the court refused to amend the caption by inserting the wife's name, and ordered that she should come up to acknowledge the fine. 8 Taunt. 87.
13. *Præcipe* directed to the vouchee amended by inserting the name of the tenant. 8 Taunt. 226.
14. Where in a fine the name George had been inserted by mistake, instead of John, the court allowed the right name to be substituted, on affidavit explaining the mistake having been put in. 1 B. & B. 15.
15. Fine amended by increasing the number of acres, the measurement on which the description of the number of acres were founded being wrong. 8 Taunt. 74.
16. A recovery of 1729 amended, by adding premises which were comprised in the deed to lead the uses, but for which the king's silver had not been paid. 8 Taunt. 303.
17. Where a recovery fifty year's old was found, by mistake, to comprise only two messuages and twenty acres of land, instead of six messuages and 300 acres of land, the blunder being wholly unexplained and unaccounted for, the court refused to permit an amendment by substituting the larger quantity. 1 B. & B. 83.
18. Recovery amended, by altering the words "in the parish of Childerditch and Brentwood, in the county of Essex," to the words "in the parishes of Childerditch and Southweald in the county of Essex," on the affidavit of the vouchee that he was seized in tail of the premises, and directed his attorney to suffer a recovery of his lands in the parishes of Childerditch and Brentwood, of which he was seized in tail, as aforesaid, but that it had since been discovered that Brentwood, wherein a part of his lands was situate, was a hamlet in the parish of Southweald, and that he intended to suffer a recovery of so much of his lands as was since discovered to be within the parish of Southweald. All the parties living. 8 Taunt. 86.
19. Recovery amended by deed to lead the uses by inserting the name of the parish of A, where the recovery was of lands in the parishes B. and C., or an adjoining town, A. being contiguous to B. and C. 8 Taunt. 191.

20. Recovery amended by inserting the additional names of the parishes where the names in the deed and the recovery differed. 8 Taunt. 244.

21. Recovery amended by adding the name of a parish (the name having been improperly spelled), on affidavit that the vouchee was seized of land in the parish proposed to be substituted, and that it was intended to suffer a recovery of all the vouchee's lands in the county in which the proposed parish was situate, but the court would not allow the name, originally inserted, to be expunged, as the affidavit did not state that there was no such parish, or that the vouchee had no lands on such parish. 8 Taunt. 262.

22. A parish was situate on the conterminous counties of S. and B.; the premises in this parish intended to be passed by a fine were situated in the county of S., but were described as situated in the county of B. The court allowed the fine to be amended by substituting the county of S. for the county of B. 8 Taunt. 87.

23. The documents relating to a recovery of premises in Northumberland did not reach London till the first day after Easter Term; the mistake was not discovered; the proceedings went on in the subsequent Trinity Term, and the recovery came to the cursitor's office in Michaelmas Term following, when the court, upon motion, allowed the recovery to pass as of Easter Term. 8 Taunt. 75.

24. The court refused to make an order compelling the amendment of a recovery suffered by an insolvent debtor. 8 Taunt. 105.

25. The court allowed the warranty of a fine to be amended, by altering it from a warranty by the husband and wife, and heirs of the husband, against themselves and the heirs of the wife to a warranty by the husband and wife, and the heirs of the wife, against themselves and the heirs of the wife. 1 B. & B. 68.

Miscellaneous.

26. Fine more than a twelvemonth old allowed to pass without any special reason assigned. 8 Taunt. 75.

27. A. was tenant for life of two moieties of common field land, called Blackacre, with remainders to B. and C. in common tail. A. was also tenant in fee of other common field land called Whiteacre. The commissioners, under an inclosure act, allotted to A. Greenacre in lieu of Blackacre and Whiteacre conjointly, without distinguishing the portion allotted in right of each. A. devised all his lands to D. in fee, and died. Covenant upon a conveyance by B. and C. to D. of all the land allotted to A. in right of Blackacre, and a recovery suffered of the entirety of certain acres, fewer than were comprised in Greenacre, Borrough, J. held, that all the estate of the tenants in tail was comprised in that recovery, and the court refused to amend it by the insertion of more acres. 1 B. & B. 69.

## FISH AND FISHERY.

Common  
fishery.

1. Proof of the owner's right to fish opposite his own land, *ad medium filium aquæ*, cannot be given under a plea of a common of fishery. 8 Taunt. 188.

2. A common of fishery is not correctly described by alleging it to be a common of fishery. 8 Taunt. 188.

Conviction.

3. In a conviction founded upon 5 G. 3. c. 14, s. 3. it must be distinctly stated in the information and in the evidence, that the proceeding was at the instance of the owner of the fishery, and therefore, where it was merely stated in the memorandum of a conviction, that the

the proceeding was at the instance of such owner; and where the information, without containing any such allegation, concluded with a mere prayer of judgment on behalf of such owner, and the evidence was wholly silent on the subject, the conviction was held to be bad. 2 B. & A. 378.

### FIXTURES.

Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant. Held, that these were the goods and chattels of the outgoing tenant, for which he might maintain trover. 2 B. & A. 165. Property in.

### FOREIGN ATTACHMENT.

1. A plea of foreign attachment stated the custom to be, that if the plaintiff in the mayor's court allege that any other person or persons owes or owe to the then defendants any money that may be attached, and that the plaintiff below alleged that he and another person owed to the defendant below a certain sum of money: Held, that such plea is bad, inasmuch as the person owing the money to the defendant must within the custom, as pleaded, be a different person from the plaintiff. 4 B. & A. 646. Subjects of.

2. *Quære*, whether a custom for a party to attach money in the hands of himself and partner could be supported? 4 B. & A. 646.

3. Money obtained of garnishes under a foreign attachment, is not, unless execution be executed, a compulsory payment so as to effect a discharge of a debt due from garnishee to the defendant in the lord mayor's court. 1 B. & B. 491. Its legal effect in discharge of the garnishee.

4. *Semble*, that entering a sum to the credit of a party in a merchant's books is not payment, unless under an express assent that such entry shall stand for payment. 1 B. & B. 491.

### FORGERY.

1. The 48 G. 3. c. 75. enacts, that bodies thrown on shore by the sea shall be buried by the parish officers, and that, after such burial, a magistrate shall give the officers a certificate and order on the treasurer of the county to pay them the reasonable and necessary expenses of the funeral, which the treasurer is, by the act, ordered to pay. The prisoner framed an order, purporting to be the order of a magistrate on the treasurer of the county, to reimburse one Cose the expenses of burying a dead body cast on shore. Held, that this was a forgery, though there was no such magistrate as the individual mentioned in the order, and though the order did not state Cose to be a parish officer, or that the expenses incurred were reasonable and necessary. 1 B. & B. 300. Subjects of.

2. The making of a written instrument purporting to be an order of a magistrate, and to be signed and sealed by J. P. as such, under the 48 G. 3. c. 75. addressed to the treasurer of the county rates, requiring him to pay J. C. a sum of money, which he had made oath In the name of a fictitious person.

that he had expended in removing and burying a dead body cast on shore, by means of which the maker obtained that sum of money from the treasurer, is forgery; although the prisoner did not obtain the money in character of any of the parochial officers named in the statute, and although there was no magistrate in the county of the name of *J. P.* 7-Price, 609.

### FRAUD.

Maxims relative to.

No man can be allowed to allege his own fraud, to avoid his own deed; and therefore, where a deed of conveyance of an estate from one brother to another was executed, to give a colourable qualification to kill game: Held, that as against the parties to the deed, it was valid, and was sufficient to support an ejectment for the premises. 3 B. & A. 367.

### FRAUDS, STATUTES OF.

Relative to contracts to answer for another.

1. *Quære*, whether, under the 29 C. 2. c. 3. s. 4. in order to charge a person with the debt of another, the consideration for the promise, as well as the promise itself, must be in writing? 1 B. & A. 297.

2. *A.* had wrongfully, without the licence of *B.*, ridden his horse, and thereby caused its death: Held, that a promise by a third person to pay the damage thereby sustained, in consideration that *B.* would not bring any action against *A.*, is a collateral promise within the statute of frauds, and must be in writing: Held also, that a motion for a new trial, where the cause has been tried during the term, may be made at any time within four days after the distringas is returnable. 2 B. & A. 613.

3. By the fourth section of statute of frauds, an agreement to pay the debt of another must, in order to give a cause of action, be in writing, and must contain the consideration for the promise, as well as the promise itself, and parol evidence of the consideration is inadmissible. 4 B. & A. 595.

Contracts relative to the sale of goods.

4. *A.* agreed to purchase a horse from *B.* for ready money, and to take him within a time agreed upon. About the expiration of that time, *A.* rode the horse, and gave directions as to its treatment, &c.; but requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; to this *B.* assented. The horse died before *A.* paid the price or took it away. Held, that there was no acceptance of the horse, within the meaning of the statute of frauds. 3 B. & A. 680.

5. Where a vendee verbally agreed at a public market with the agent of the vender to purchase twelve bushels of tares (then in vender's possession, constituting part of a larger quantity in bulk,) to remain in vender's possession till called for, and the agent on his return home measured the twelve bushels, and set them apart for the vender. Held, that this did not amount to an acceptance by the latter, so as to take the case out of the 17th section of the statute of frauds. 3 B. & A. 321.

Relative to contracts, the time of whose performance exceeds a year.

6. A contract for a year's service, to commence at a subsequent day, being a contract not to be performed within the year, is within the 4th section of the statute of frauds, and must be in writing; and therefore no action can be maintained for the breach of a verbal contract made on the 27th May for a year's service to commence on the 30th of June following. 1 B. & A. 722.

FREIGHT.

## FREIGHT.

1. By a charter-party freight was agreed to be paid for the use or hire of the ship, at a certain rate per ton, for a voyage out and home, in manner following, viz. a certain sum in advance on the ship's clearing outwards, and the residue, half in cash and half in approved bills, upon the delivery of the homeward cargo; the owner also appointed C. S. master, at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty, and the owner expressly instructed C. S. to be careful to sign bills of lading with the clause "freight payable as by charter-party." The ship was consigned to C. and Co. in *Calcutta*, by whom she was put up for her homeward voyage, as a general ship, and different merchants shipped goods by her, C. and Co. taking for homeward freight bills payable sixty days after delivery of the cargo; and a new master having been appointed by C. and Co. in conjunction with C. S., signed bills of lading, with the clause "paying freight agreeable to freight bill." The freight bills were made payable in *London* to B. and Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as C. and Co., were cognizant of the terms of the charter-party. Held, that the owner of the ship had a lien on these goods to the extent of the homeward freight. C. and Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them and B. and Co. their agents, those goods were, by the bill of lading, consigned to B. and Co.: Held, that as between the owner of the ship and B. and Co., the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by charter-party. In the charter-party the freighter promised to pay and defray two-thirds of the port charges, the owner having paid the whole, was held to have no lien on the goods shipped for those charges. 4 B. & A. 630.

Lien for.

2. A ship freighted with timber, &c. by the agents of the defendants at *Dantzic*, and consigned to their house in *London*, was on her arrival, and after part of the cargo had been delivered, seized by the revenue officers on suspicion that she was not Prussian built. The treasury, on petition, ordered the ship to be restored, on condition that the cargo should be exported, and on payment of a sum as a satisfaction to the seizing officers. This sum the master (plaintiff) paid, and the defendants accepted and exported the cargo. Held, that this conduct of the master sufficiently shewed the voyage to be illegal, and that he had submitted to such illegality so as to preclude him from recovering the freight. 8 Taunt. 89.

Miscellaneous.

## GAME.

1. In an action against a gamekeeper for a penalty for using a gun to kill game without being qualified, evidence of the real title of the manor is admissible, for the purpose of negating the existence of a colourable title in the person under whom the defendant claims to act. Entries in the books of the clerk of the peace of deputations formerly granted to gamekeepers by the real owner of the manor, are also evidence to shew that manorial rights were publicly exercised by him, and that the person whose title was set up by defendant knew that he had not any title whatever. 3 B. & A. 341.

Game-keeper.

2. A gamekeeper was authorized by his deputation to seize greyhounds, setting-dogs, ferrets, and to do all things belonging to the office of gamekeeper, according to the directions of the acts of parliament: Held, that he was not thereby authorized to seize hounds. 1 B. & A. 134.

Of actions, information, and convictions relative to.

3. Upon a conviction under stat. 5 Ann. c. 14. s. 2. against a carrier for having game in his possession, it is sufficient if in the information and adjudication, the qualifications mentioned in stat. 22 & 23 Car. 2. c. 25. s. 3. be negatived, without negating them in the evidence. 5 M. & S. 206.

### GIFT.

What is.

A verbal gift of a chattel, without actual delivery, does not pass the property to the donee. 2 B. & A. 551.

### GRANT.

Construction of.

1. By deed an estate was settled, after several preceding estates tail, to the use of all and every the nearest of kin, in equal degree, to D. M. at the time of her decease, without issue of the name of *Brewer*: Held, that a person who at the time of D. M.'s death was her nearest of kin born with the name of *Brewer*, but who was not her nearest of kin, and who had, previous to D. M.'s death, married and assumed her husband's name, was not entitled to take, under this clause, in the deed. 3 B. & A. 474.

Reservations and exceptions in.

2. Where a plea stated that A. was entitled to the equity of redemption and subject thereto, that B. was seised in fee, and that they, by lease and release, granted, &c. the premises; excepting and reserving A. and his heirs, &c. a liberty of hunting, &c.: Held, that as A. had no legal interest in the land, there could be reservation to him, and that this was a defective title and not a title defectively set out, and that the plea was bad in substance. 3 B. & A. 66.

Livery of seisin.

3. A deed contained a power of attorney to A. B. to deliver seisin of the premises, according to the form and effect of the deed: Held, that it was not necessary for the attorney to make livery on the day of the date of the deed, but that his power was well executed afterwards. 3 B. & A. 156.

### GUARANTEE.

Construction.

1. The plaintiffs declared, that in consideration that they would lend S. & Co. 5000*l.*, the defendant promised to be answerable for the same; that they did lend the said sum, whereby the defendant became liable. The form of the guarantee, was, that the defendant would be answerable to the extent of 5000*l.* for the use of the house of S. & Co; at the time this was given, S. & Co. were indebted to the plaintiffs in a considerable sum of money, for which the plaintiffs held a promissory note drawn by S. & Co., and other bills, as a security. On receiving the guarantee, the plaintiffs cancelled the note and delivered up the bills which they held: S. & Co. then delivered those bills back again to the plaintiffs, together with a new promissory note, but no money passed. Held, that the guarantee only

only contemplated future loans, and that the transaction did not amount to a loan of money so as to charge the defendant. 8 Taunt. 208.

2. A guarantee of the payment of *A. B.*, to the extent of 60*l.*, at quarterly account bill two months for goods, to be purchased by him of the plaintiff, is not a continuing or standing guarantee to that extent for goods to be at any time supplied to *A. B.* until the credit is recalled. 3 B. & A. 593. Duration.

3. One of two drawers of a joint promissory note, payable 12 months after date, who is surety for the other to the amount, is not discharged by the drawee not having demanded payment from the surety when due, nor till after having entered into a deed of composition with the principal and his other creditors, and received the composition money. 6 Price, 111. Discharge.

4. *Quære*, whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as payment. *Ibid.*

5. A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor: one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the banker, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt, and subsequent advances, as constituting items in one entire account, and the balance due at the time of the partner's death is considerably reduced, and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor; the person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond. Held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions; but they were not at liberty to treat it at a subsequent period; and that, having received it in different payments, a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, that the bond was to be considered as paid. 2 B. & A. 39. Payments in discharge of.

One of the makers of a joint and several promissory note, after the same had become due, gave his bond to the holder for the amount; but before the commencement of the action no money was actually paid on the bond. Held, that until he had paid money upon the bond, he could not maintain an action for money paid, in order to recover contribution against any of the other makers of the original note. 2 B. & A. 51. Right of co-surety.

### GUARDIAN AND WARD.

There cannot be a guardian in socage of an equitable estate; and, therefore, where a pauper married the widow of a man who had paid for and been let into possession of a freehold cottage, and had died, leaving a daughter, but without having had any legal conveyance executed to him in his lifetime, it was holden that the pauper's residence in the cottage for forty days did not confer a settlement on him, the widow not being guardian in socage to the daughter. Guardianship.

Held,

Held, also, that the court will not take notice of doubtful equitable estates. 1 B. & A. 560.

### HABEAS CORPUS.

When grantable.

1. The writ of *habeas corpus* at common law, although a writ of right, is not grantable of course, but only on motion in term time, stating a probable cause for the application, and verified by affidavit. *Quere*, whether under the statute 31 Car. 2. c. 2., which only applies to cases where the application is made to a judge in vacation, the writ be grantable of course. 3 B. & A. 420.

2. This court will not interfere to take a party out of the criminal custody of the court of K. B., in order to surrender him in discharge of his bail. 1 B. & B. 23.

Return to.

3. Where the return to a *habeas corpus* stated that an English seaman being found on board a ship liable to forfeiture under 45 G. 3. c. 121. s. 1. was carried before a magistrate, and, upon due proof, as by the statute in that case made and provided is required, was committed, &c. Held, that this was insufficient, and that it was necessary to state distinctly what proof was given, in order that the court might see whether it was due proof required by the 7th section of the act. 4 B. & A. 295.

### HAWKERS' AND PEDLARS' ACT.

Construction of.

1. A licensed hawker opening a room in a place, he not being a householder there, and that not being the usual place of his abode, and selling there by retail, does not there commit an offence within the statute 50 G. 3. c. 41. s. 7.; to constitute such an offence, the selling must be by outcry, &c. or some mode of sale at auction. 1 B. & A. 100.

2. A licensed auctioneer going from town to town in a public stage coach, and sending goods by public waggon, and selling the same on commission by retail, or by auction, at the different towns, is a trading person within the meaning of the 50 G. 3. c. 41. s. 6., and must take out a hawker's and pedlar's licence. 4 B. & A. 510.

3. A person travelling from town to town, and having packages of books, &c. sent after him by public conveyance, and taking rooms at each town, and there selling such books, &c. by retail by auction, is a trading person within 50 G. 3. c. 41. s. 7. 4 B. & A. 517.

### HEIR.

Relative to the mode of taking.

1. Devise of his estate to his wife for life, and after her decease to his son (his heir at law), charged with the yearly payment of 100*l.* to his daughter for her life, and at her decease with the sum of 1500*l.* to be divided among her children, or if no child, to be disposed of as she should direct; and in default of payment of either of the said sums within the time appointed to G. T., his heirs, administrators, and assigns, in trust, to raise the 100*l.* out of the rents and profits, and the 1500*l.* by sale or mortgage of a sufficient part of the lands, and

and subject to the said charges and trust, to his said son, his heirs, executors, administrators, and assigns. Held, the son took by descent and not by purchase. 5 M. & S. 14.

2. Devisee to the heir at law in fee, with an executory devise over in case he does not attain twenty-one years of age; held, that this does alter a quality of the estate which he would otherwise have taken as heir, and that he therefore takes by descent, and not by purchase. 1 B. & A. 530.

### HIGHWAY.

1. Where a road set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public, and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish were bound to repair. 4 B. & A. 447. What considered as.

2. Where, in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large. Held, that this places the township in the situation of a parish, and that it is necessary for the defendants to show by evidence some other persons in certainty who are liable, in order to deliver themselves from their liability to repair. 4 B. & A. 75. Repairing.

3. Where a local turnpike act, after empowering the trustees under it to take tolls, directed that the roads should, from time to time, be repaired by the trustees out of the money arising by virtue of the act. Held, that this only made the tolls an auxiliary fund in the hands of the trustees; and that the inhabitants of the township, where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road. 2 B. & A. 179. Held, also, that such inhabitants may, after conviction, apply for motion for relief against the trustees under 13 G. 3. c. 84. s. 33. Ibid. Held, also, that 13 G. 3. c. 84. s. 63. only refers to diversions under writs of *ad quod damnum*, and under 13 G. 3. c. 78. s. 19. Ibid.

4. An order for stopping up an unnecessary highway under 55 G. 3. c. 68., must be made at a special sessions, and that fact must appear on the face of the order. 3 B. & A. 414. Stopping up.

5. The 13 G. 3. c. 78. s. 62. is applicable to proceedings by order of two justices under 55 G. 3. c. 68. s. 2. Held, therefore, that it is necessary to give reasonable notice of the special sessions at which any such order is to be made, to the several justices acting and residing within the division; and that, unless such notices be given, the sessions ought not to conform and enrol such order, even though there be no appeal against it. 2 B. & A. 228.

6. Indictment against a parish for non-repair of a highway, lying within it; plea, that the inhabitants of another parish have repaired, and been used and accustomed to repair, and of right ought to have repaired. Held ill, for the plea ought to have shown a consideration. 5 M. & S. 260. Indictment for not repairing.

7. Indictment against the inhabitants of a parish for not repairing a road; plea, that the inhabitants of a particular district within the parish

parish have immemorially repaired all the roads within that district, of which the road indicted was one. Held, that this plea was good, although it did not state any consideration for the liability of the inhabitants of the district. 1 B. & A. 348.

### HUNDRED, ACTIONS AGAINST.

On the riot act. 1. In an action on the statute 52 G. 3. c. 130., to recover the value of the premises feloniously destroyed, brought against the hundred by several partners in trade, three of whom being present when the fact was committed, one only gave his examination upon oath, without stating that to the best of his belief the others had no knowledge of the person who committed the fact. Held, that that was not sufficient. 1 B. & A. 146.

2. Where the leader of a mob, having entered a gunsmith's shop and demanded arms, was detained, and the mob then declared that unless he were released, they would pull the house down, and they did enter and break the windows, window-frames, &c., and for that purpose used some of the arms found in the shop, and carried away others. Held, that this was evidence of a purpose to demolish the house, and that the owner might recover against the hundred a reparation in damages for the injury done to the house itself, and to the arms actually used in the act of demolishing; but that he was not entitled to recover for the value of the arms away, that being a substantive and distinct felony, and therefore not within the statute 1 G. 2. st. 2. c. 5. 1 B. & A. 487.

On the black act.

3. In order to bring an action against the hundred on statute 9 G. 1. c. 22., the notice required by the statute must be given to some of the inhabitants of the hundred before the plaintiff's examination on oath is delivered to the magistrate. 1 B. & B. 64.

### INCLOSURE.

Commissioners. 1. Where commissioners by an inclosure act were impowered (*inter alia*) to make roads, and to defray the expence by a rate on the several proprietors, and they executed their award as to the allotments before the roads were completed, or sufficient funds were raised for that purpose. Held, that they might afterwards make a case to defray the expence of completing the roads. 1 B. & A. 82.

2. The determination of the commissioners under an inclosure act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination. 4 B. & A. 462.

Appeals against.

3. In an appeal against an inclosure of a highway by virtue of a writ of *ad quod damnum*, the notices required by the 55 G. 3. c. 68. must be given, and a notice to the party interested is not alone sufficient. 1 B. & A. 373.

4. An inclosure act gave to the party aggrieved a right of appeal for any thing done in pursuance of that act, or of the recited general inclosure act, in giving to the commissioner and to the parties concerned ten day's notice in writing. Notice of appeal against an order ascertaining its boundaries between two townships, was served on the commissioner, but not on the lady of the manor, who was a party materially concerned in the question. Held, that the notice was insufficient,

cient, although the general inclosure act authorised the commissioner to ascertain the boundaries between the several parishes, and gave a right of appeal on giving notice to the commissioner. 1 B. & A. 630.

5. Certain referees were ordered by act of parliament to ascertain the amount of a yearly corn rent, and the court of Quarter Sessions was ordered to declare the amount. The referees having made their report to the court of Quarter Session, the court ordered it to be filed. Held, that it was no declaration by the court of Quarter Sessions, of the amount of the corn-rent. 1 B. & B. 460. Construction of statutes.

6. By the general inclosure act, the legal title to an allotment is not acquired until the execution and proclamation of the commissioner's award. And where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might fence their allotments, after they had been marked, staked out, and confirmed, and before the signing of the award; and might also, within three months before the execution of the award, sell and convey their interest in the allotments, the commissioners being thereby authorised to allot to the purchasers; and the latter after the execution of the award, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that, where the allotments were copyhold, that the deed should be enrolled in the court rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, viz. after the execution of the award. Held, that this authority to enclose, and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seizing of the land, and that therefore these provisions, not sufficiently countervailing those of the general inclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. 2 B. & A. 171.

### INCORPOREAL PROPERTY.

The occupier to a mill may maintain an action for forcing back water and injuring his mill, although he has not employed it precisely in the same state for twenty years; and therefore it was holden to be no defence to such an action that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, though the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill. 1 B. & A. 258. Title to.

### INDICTMENT.

1. The statute 9 and 10 W. 3. c. 32. has not altered the common law, as to the offence of blasphemy, but only given a cumulative punishment. It is therefore still an offence at the common law to publish a blasphemous libel. 3 B. & A. 161. Indictable offence.

2. It is not lawful to publish a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature. 3 B. & A. 167.

3. Plea

Plea in bar.

3. Plea that prisoner had been acquitted on an indictment for murdering a child by administering a certain deadly poison; to wit, oil of vitriol, and by forcing the child to take drink, and swallow down a large quantity of the said oil of vitriol, knowing it to be a deadly poison, whereby the child became sick and distempered in the body, and by that sickness languished and died. Held a good bar to an indictment (first count) for murdering the same child, by administering a large quantity of oil of vitriol, and forcing the child to take into his mouth and throat a large quantity of the said oil of vitriol, knowing that the said oil of vitriol would occasion the death of the child, whereby he became disordered in his mouth and throat, and by the disorder, choking, suffocating, and strangling, occasioned thereby, languished and died; (second count) for murdering the child, by administering a certain acid called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat, by means whereof he became disordered in his mouth and throat, and incapable of swallowing his food, and died of the inflammation, injury, and disorder, occasioned thereby. 1 B. & A. 473.

Judgment and its incidents.

4. Where a defendant was convicted of a libel, which on the face of it purported to have been written in consequence of his having read a statement of facts in different news-papers, an affidavit that he did read such statements in such news-papers, may be received in mitigation of punishment, but an affidavit that the facts contained in those statements were true is not admissible. 4 B. & A. 314.

### INFANT.

Relative to contracts by.

In an action on a bill of exchange against the acceptors, where the payee and first indorser was an infant, the jury having found a verdict for the plaintiffs on evidence that the defendants knew when they accepted it that the payee was an infant, and that he had in fact indorsed the bill before they accepted it, the court, under those circumstances, (it appearing also that the defendants had been in the practise of raising money on similar bills) refused to disturb the verdict by granting a new trial, applied for on the ground of the legal objection. That an infant could not by his indorsement give currency to a bill of exchange, but they refrained from giving any opinion on the effect of it, if brought before them on a case more free from imputation. 4 Price, 300.

### INFORMATION, CRIMINAL.

Common.

1. Where only circumstances of strong suspicion are stated in affidavits, on which a rule for a criminal information is moved, it is not sufficient unless the deponents also had their belief that the party against whom the application is made, acted from corrupt motives. 3 B. & A. 582.

2. Where a criminal information is applied for against a magistrate, the question for the court is not, whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive, (amongst which fear and favour are generally included,) or from mistake or error only. In the

the latter case, the court will not grant the rule. Secondly, in the investigation of a charge of felony before a magistrate, an attorney is only as a matter of courtesy permitted, but has no right to be present, nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion and advice upon the case. 3 B. & A. 432.

3. The court will grant a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury accompanied by the comments, although the statement be correct, and the party has no malicious motive in the publication. 1 B. & A. 379.

### INNKEEPER.

1. A house of public entertainment in *London*, where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee house, and was not frequented by stage coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of inn-keepers, and has a lien on the goods of his guest for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in *London*. 3 B. & A. 283.

2. In such a case, the court refused to set aside the inquisition, on the ground of the damages being excessive, 1000*l.* having been awarded by the jury to the plaintiff, although the parties were in a moderate sphere of life. 5 Price, 641.

### INQUIRY, WRIT OF.

It is sufficient notice of a plaintiff's intention to appear before the sheriff by counsel, on the execution of a writ of enquiry, that the plaintiff's attorney inform the attorney for the defendant of such intention. Had there been no intimation of such an intention, the defendant should have applied to the sheriff to put off the execution of the writ of enquiry. Evidence may be given on such an occasion (where the action is for seduction) for the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter, with an intention of marriage. On a motion to set aside the inquisition, on the ground of inadmissible evidence having been received, and allowed to go to the jury, the court considered themselves bound by the sheriff's minutes (verified by his affidavit) of the evidence which had been offered. 5 Price, 641.

Notice relative to.

Of setting it aside.

### INSOLVENT DEBTOR.

1. Notice under 32 G. 3. c. 28. must be given to a creditor four clear days, exclusive both of the day of service, and that of presenting the petition. 4 B. & A. 522.

Relative to the discharge of.

2. Applications for discharge of insolvent debtors not to be made before the rising of the court. 5 Price, 648.

3. A

From what demands discharged.

Mode of enforcing the rights of.

Of suits by.

Relative to the assignees

Statutes.

3. A plea of discharge under the insolvent debtor's act is no bar to an action of trespass for *mesne* profits, even though incurred before the discharge. 3 B. & A. 407.

4. A certificate obtained in *Newfoundland*, under the 49 G. 3. c. 27. s. 8., does not entitle the defendant to be discharged on entering a common appearance, but must be pleaded in bar. 1 B. & B. 13.

5. An insolvent debtor having petitioned the insolvent court to be discharged under the act, a creditor gave notice of his intention to oppose him on the ground that the debt was fraudulently contracted: to induce the latter to withdraw his opposition, the insolvent agreed to execute within three days after his discharge, a warrant of attorney for the debt, and in the mean time to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged and the warrant of attorney was executed on the delivery up of the note. The court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the insolvent act, in as much as it enabled the creditor to take to himself a large portion of the future effects, which the legislature intended to be distributed amongst all the creditors. 4 B. & A. 691.

6. Entries in the minute book of the quarter sessions for *London*, that *J. T.* was a prisoner (on a day certain) for debt in the *Fleet Prison*, and was discharged, and that *C.* was chosen assignee of his estate, together with proof of the assignment, and that *J. T.* took the oath prescribed by the 51 G. 3. c. 125. (insolvent act) upon being discharged, were held sufficient to support the title of *C.*, claiming in ejectment as assignee of the estate of *J. T.* under the said act, without proving that *J. T.* was a prisoner on the day mentioned in the said act. 5 M. & S. 72.

7. A prisoner under an attachment for contempt for non-payment of costs pursuant to an award, may be brought up at the suit of the prosecutor, in order, to make him deliver in a schedule of his effects, under the compulsory clause in statute 32 G. 2. c. 28. The court considered the 33 G. 2. c. 5., as incorporated with the 32 G. 2. 8 Taunt. 57.

## INSURANCE.

Nature of the interest

Of insurances void and avoided.

1. Where the memorandum for charter stated one half of the freight to be paid in cash on unloading and right delivery, and the remainder by bill on *London*, at four months' date, and then, after containing stipulations for unloading, discharging, demurrage, &c. added, "the captain to be supplied with cash for the ship's use," and in pursuance of the last stipulation, the master drew a bill on the freighters which was duly accepted and paid. Held, that this was not to be considered as a payment of freight in advance, but as a loan to the owner of the ship, and that (the ship having been lost on her homeward voyage) the freighters had no insurable interest in such bill. 4 B. & A. 582.

2. Upon a policy effected (after the declaration of war by *America*, but before it was known in *England*;) in which it was not stated in the policy, nor communicated to the underwriter that the assured was an American subject, and the loss happened in consequence of a seizure by

by the American government for a forfeiture for the breach of their non-importation act. Held, that the action could not be maintained even after the war had terminated. 4 B. & A. 423.

3. Policy of insurance from *Parz* to *New York*, with leave to call at any of the Windward and Leeward Islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any port or places, particularly at all or any of the Windward and Leeward Islands, without being deemed any deviation. Held, on this policy, the ship having proceeded to two of the Leeward Islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance. 4 B. & A. 72.

4. A licence for the exportation of gun-powder was granted on the petition of *A. B.* on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned; *A. B.*, the manufacturer of the gun-powder, sold it to *C. D.* and contracted to deliver it free on board a ship. Held, that the condition of this licence was not complied with by *A. B.*'s giving the required security, he not being the merchant exporter within the meaning of the licence. 4 B. & A. 184.

5. Where a ship had sailed from *Elsineur*, on her voyage home, six hours before the owner, who followed in another vessel on the same day, and having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship: Held, that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was "all well at *E.* on the 26th July," the day of her sailing. 1 B. & A. 672.

6. A policy on freight, at and from the ship's port of lading at *J.* to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of goods loaded at an intermediate port, and, therefore, where the ship having sailed with a cargo loaded at *J.*, was, during the voyage, cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge, and earned freight: Held, that the assured, who had abandoned to the underwriter, upon intelligence of the loss, and had assured, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring the said freight. 5 M. & S. 6. Construction of.

7. In an action on a policy on a ship, by which, amongst other risks, the underwriters insured against fire, and barratry of the master and mariners, they are liable for a loss by fire occasioned by the negligence of the master and mariners. 2 B. & A. 73. Held also, that where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss, was no breach of the implied warranty that the ship should be properly manned. *Ibid.*

8. A transport, in government services, was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard and uneven, and on the tide having left her, she received damage by taking the ground. Held, that this was a loss by a peril of the sea. 2 B. & A. 315.

9. Policy on ship for four months, at and from a place to any port or ports whatsoever. Held, that an open roadstead (being the usual place

place of loading and unloading,) was a port within the meaning of this policy. 2 B. & A. 460.

10. The captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured. Held, in an action upon a policy of insurance upon Spanish property, subscribed by British underwriters, who, at the time of effecting the policy, knew that the assured were Spaniards, and that Spain was at war with the state to whom the capturing vessel belonged, that this was a loss by jettison, that it was in the policy of insurance signifying any throwing overboard of the cargo for a justifiable cause; secondly, that it was a loss by enemies; and, thirdly, if not by jettison, in the strictest sense, that it was something of the same kind, and, therefore, came within the words, "all other losses and misfortunes." 3 B. & A. 398.

Warranty.

11. Where a vessel, being under the conduct of a pilot, in going up a harbour, took the ground, in the ordinary course of navigation, and afterwards, being moored at a quay, on the ebb of the tide, took the ground, fell over on her side, and was injured, and her cargo damaged; Held, that this was not a stranding, for which the insurer was liable. 1 B. & B. 388.

Total loss.

12. A loss of voyage, for the season, by perils of the sea, is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, &c. where the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding in the voyage. 5 M. & S. 47.

13. A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas, for the mere preservation of their lives, and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port. Held, that such desertion of the crew did not of itself amount to a total loss; and, secondly, that the ship having been sold under the decree of the admiralty court, to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and that there was no more than a partial loss. 2 B. & A. 513.

Abandonment.

14. If one of several, jointly interested in a cargo, effects an insurance for the benefit of all, he may give notice of abandonment for all. 5 M. & S. 47.

15. The assured are bound to give notice of abandonment at the earliest opportunity; notice given five days after they received intelligence of the loss, was held too late. 5 M. & S. 47.

16. An abandonment to the underwriter on ship transfers, the freight subsequently earned, as incident to the ship; therefore, where ship and freight were insured by separate sets of underwriters, and the ship being a general ship, was captured, and ship and freight were abandoned to the respective underwriters, who paid each a total loss, and the ship being re-captured, performed her voyage, and earned freight, which was received by the defendant for the use of those who were legally entitled thereto. Held, that the underwriters on ship was entitled to recover. 5 M. & S. 79.

Premium.

17. Where a licence was obtained, and insurance effected from *Stiga* to *Hull*, on goods the produce of *Russia*, on board a Swedish ship, but the ship sailed three days before the letter, directing the licence to be obtained, reached the agent, the letter having been delayed by contrary

contrary winds beyond the usual time, and the licence was obtained two days afterwards, and the insurance effected subsequently to that; Held, that though the voyage was, in its inception, illegal, being contrary to 12 Car. 2. c. 18. s. 8. nevertheless, the assured might recover back the premium. 5 M. & S. 122.

18. The defendant *B.*, with other underwriters, subscribed in August 1814, a policy on hides. The ship was captured, and the plaintiffs abandoned to the underwriters, and claimed a total loss. Shortly afterwards, the ship was re-captured, and all the underwriters, in October 1814, adjusted a salvage loss, deducting short interest, to 64*l.* 18*s.* 8*d.* per cent., save the defendant, who, in February 1815, indorsed on the policy as follows: "Adjusted 93*l.* per cent. on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid, to the same amount as by the other underwriters, and if the same exceed 93*l.* per cent. Mr. *B.* to pay the excess; if short, Mr. *H.* (the insured) to return the difference." Held, in assumpsit, on this policy, that this was a conditional, not an absolute adjustment, and that the plaintiffs, not having proved their compliance with the conditions, were not entitled to recover. 8 Taunt. 119. Adjustment.

19. An insurance broker is only entitled to receive payment for the assured, from the underwriter, in money, and, therefore, a custom to set off the general balance, due from the broker to the underwriter, in the settlement of a particular loss, is illegal. 4 B. & A. 210. Broker.

20. The plaintiff, resident abroad, ordered *A.*, his correspondent here, to effect an insurance on his account. *A.* was in the habit of employing the defendant as his broker, to effect insurances on his own account, and for his correspondents abroad, and instructed him to effect this insurance, but did not mention the plaintiff's name; the plaintiff paid the amount of the premiums, 280*l.*, to *A.*, but that fact was not known to the defendant at the time of effecting the insurance. *A.* was indebted to the defendant in 21,000*l.*, including the amount of the premiums, and in the course of the next year, paid the defendant 33,000*l.*, but incurred further debts, so as always, throughout the year, to have a balance in favour of the defendant, to a greater amount than the sum due for the premiums. The defendants received 385*l.* from the underwriters, on the loss, and passed the same to *A.*'s account. Held, that the defendant had no general lien, and that the particular lien was discharged, as the defendant must be considered as having been paid the amount of the premiums. If a broker, having a lien on a policy, part with it, his lien revives on re-possession. 8 Taunt. 149.

21. A policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter, in account, for the loss, and transmits to the assured an account, in which he states himself to be a debtor for the amount of the loss, and for the balance of that account, the assured draws a bill upon the broker, which the latter accepts, but does not pay. The underwriter's name never having been struck off the policy, it was held, that he was not discharged. 4 B. & A. 395. Underwriter.

22. A ship insured at and from a port, sails on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry. The defect is discovered before any loss accrued, and part of the cargo is discharged, and a loss subsequently accrues, in no degree attributable to her having been overladen in the early

part of her voyage. Held, that the underwriters were liable for such loss. 2 B. & A. 320. The vessel having sailed, and put back to the *Downs*, and then sailed again, and laboured and strained much from being overloaded, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of the cargo, it was only communicated to them that the ship was too deep in the water. Held, that as the subsequent loss had not in any degree arisen from her having so strained and laboured, the communication of that fact was immaterial, and that the communication made was quite sufficient. Held also, that the memorandum giving such liberty, did not require a new stamp. *Ibid*.

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### INTEREST.

On affirmance  
of judgment.

1. Interest allowed on affirmance of a judgment for the balance due from a banker, on account of money deposited with him (it being the custom of the bank to allow interest), but at the rate only which the bank were accustomed to allow. 8 Taunt. 250.

2. Interest allowed on affirming in an action or breach of covenant for non-payment of an instalment of the purchase-money, although there be an express engagement that interest shall be paid only on one instalment. 5 Price, 529.

3. On a judgment recovered against bankers for a balance due from them, of money deposited in their bank by a customer, the court will on affirmance order the interest to be added to the damages, where the custom of the bank is to allow it. But they will make the order for interest after the same rate only at which it was the usage of the bank to allow it to their customers. 5 Price, 536.

4. The court of error will not allow interest on affirmance, on an action on recognizance of bail, on the ground that the original was on a promissory note, the bail being only liable for the sum sworn to and cost. 6 Price, 336.

5. Interest allowed on the affirmance of a judgment, in an action for breach of covenant for non-payment of purchase-money on the whole sum recovered below, and from the date of the judgment below, notwithstanding an express agreement between the parties, that part only of the sum recovered should bear interest. 8 Taunt. 245.

On the action  
for.

6. Declaration on debt for 800*l*. on a covenant (in a mortgage deed, for securing payment on a future day, certain of that sum and interest) that the defendant would pay the said sum of 800*l*., with interest on, &c.: with breach that he did not, nor would pay the said sum of 800*l*. on, &c. Held good, on special demurrer, although there was no averment that the interest had been satisfied or that the plaintiff abandoned his claim thereto. 4 Price, 282.

7. A principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for independently of the other. 4 Price, 282.

8. Interest is not a part of the debt secured by mortgage, but rather sounds in damages, although, *semble*, it may be sued for in debt. 4 Price, 282.

JUDGE.

## JUDGE.

In actions of trespass and false imprisonment, the question of reasonable and probable cause for the apprehension of the plaintiff, cannot be left to the jury. 8 Taunt. 182. Province of.

## JUDGMENT.

1. Judgment signed after a summons for further time to plead is returnable, is irregular. 2 B. & A. 355. When signed.

2. Judgment of *nonpros* must be signed within twelve months of the return of the writ. 3 B. & A. 271. Of nonpros.

3. A defendant is not entitled in this court to judgment as in case of a *nonsuit*, if the plaintiff (having given notice of trial for the next term after that in which issue is joined) do not proceed accordingly, but countermand his notice. 5 Price, 187. Rule to show cause therefore discharged on a peremptory undertaking. *Ibid*. As in case of a nonsuit.

4. Where a cause was set down for the sittings in term, and made a *remand* to the sittings after term by consent, the defendant may move for judgment as in case of a *nonsuit*, if the plaintiff afterwards withdraw the record. 2 B. & A. 709.

5. In showing cause against a rule for judgment, as in case of a *nonsuit*, an affidavit that the plaintiff did not proceed to trial according to notice, in consequence of the absence of a material, need not name the witness. 8 Taunt. 104.

6. Rule for judgment as in case of a *nonsuit* for not proceeding to trial, after issue joined (obtained in the next term as it may be in this court) and notice of trial given, and countermanded, the plaintiff's attorney voluntarily (although too late, if it had been an ordinary case) giving a peremptory undertaking to proceed at the next assizes, discharged, and without costs, on its being shown as cause, that a serious domestic misfortune had prevented the plaintiff's solicitor from proceeding to trial. 7 Price, 531. The voluntary undertaking so given, however, must be afterwards made a rule of court. *Ibid*.

7. Where the rule for judgment, as in case of *nonsuit*, is discharged on the plaintiff's peremptory undertaking, no sufficient reason having been given for not proceeding to trial pursuant to notice, the defendant is entitled in this court to the costs of the application. 6 Price, 202.

8. A rule obtained by the plaintiff for judgment, as in case of a *nonsuit*, being made absolute generally without costs, applies only to the costs of the motion, not the costs of the suit. 7 Price, 709.

9. This court will set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest. 4B. & A. 92. Of setting judgments aside.

## JURY.

1. In striking a special jury, the coroner is not bound to take the jurors as they occur upon the sheriff's books, but is to make a selection, and where he had made such selection impartially, the court refused to cancel the list of the persons so selected. 1 B. & A. 193. Special jury.

Offences by.

2. A rule for a special jury might be served sufficiently early to enable the opposite party to strike the jury before the day of trial, and therefore where the rule was served at 6 o'clock on the evening preceding the day fixed for the trial, it was held, that the cause was properly tried by a common jury. 2 B. & A. 400.

Challenging.

3. Upon the trial of an indictment for a misdemeanor which continued more than one day, the jury, without the knowledge or consent of the defendants, separated at night. Held, that the verdict was not, therefore, void, and that it formed no ground for granting a new trial: it not appearing that there was any suspicion of any improper communications having taken place. 2 B. & A. 462.

4. The master of the crown office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholder's book; he also took those only whose names had the addition of "esquire," or some higher degree: and included some persons who were in the commission of the peace. Held, that in so doing he was perfectly right. He also included in his nomination some person who, as a grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were then substituted in their places. Held, that he was wrong in his opinion, but that there was no ground for presuming partiality. 4 B. & A. 471.

5. No challenge can be taken either to the array or to the polls, until a full jury have appeared; and therefore where the challenges are taken previously, they are irregularly made: the disallowing of a challenge is not a ground for a new trial, but for a *venire de novo*, and every challenge must be propounded in such a way as that it may be put at the time upon the *nisi prius* record, so that the adverse party may either demur, or counterplead, or deny the matter of challenge, in which last case only, triers are to be appointed, and therefore where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of the court as a matter of right upon their sufficiency. 4 B. & A. 471.

6. There can be no challenge to the array, on the ground of *undifferency* in the master of the crown office, he being the officer of the court expressly appointed to nominate the jury. The only remedy in such a case is to apply to the court by motion to appoint some other officer to nominate a jury. 4 B. & A. 471.

7. The sheriff's officer had neglected to summon one of the twenty-four special jurymen returned on the pannel. Held, that this was no ground of challenge to the array for *undifferency* on the part of the sheriff. 4 B. & A. 471.

8. It is not competent to ask jurymen (whether special jurymen or talesmen) if they have not previously to the trial expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground, but that such expressions must be proved by extrinsic evidence. 4 B. & A. 471.

## JUSTICE OF PEACE.

Jurisdiction of.

1. A justice of peace has authority to issue his warrant for the arrest of a party, charged with having published a libel; and upon the neglect of the party so arrested to find sureties, may commit him to prison, there to remain till he be delivered by due course of law. 1 B. & B. 548.

2. The

2. The acts of a justice of the peace, who has not duly qualified, are not absolutely void, and therefore persons seizing goods under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers. 3 B. & A. 266.

3. Where the statute of labourers gives a magistrate jurisdiction to examine upon oath any servant, &c. and to make order for payment of wages to such servant, and a magistrate, in his adjudication on this act, avers a complaint made on oath, it is not competent in replevin, for taking the plaintiff's goods, for the plaintiff to plead in bar of a cognizance made under a warrant of distress and sale, founded on that adjudication, that the servant did not duly make oath before the magistrate, that the sum claimed was justly due to him for wages. Nor can he plead that the sum claimed was not due. Where a magistrate has competent jurisdiction, and adjudges, and on refusal to pay, issues a warrant of distress and sale, the goods taken under it are not replevisable. Dictum per Richardson J. 1 B. & B. 57.

4. In the notice required to be given to persons within the 24 G. 2, c. 44. of actions intended to be brought against them, it is not necessary to name all the parties meant to be included in the action, or to express whether the action is intended to be joint or several. 5 Price, 168.

Order of.  
Action against.

## LANDLORD AND TENANT.

1. A lease of coal mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void to all intents and purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent: Held, that a tenancy from year to year, was not thereby created, for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser work, commencing two years before the day of demise in the ejectment. 4 B. & A. 401.

Relative to  
leases and to  
the relation of  
landlord and  
tenant.

2. Held also, that by 55 G. 3. c. 184. s. 49. the commissioners of stamps are authorized to stamp letter, of administration *de bonis non* on security given, and without payment of the duty, as well in cases where the duty has been paid on the original letters of administration as when such letters of administration have been originally stamped on credit. Ibid.

3. The owner of the fee granted to A. his partners, fellow adventurers, &c. free liberty to dig for tin, and all other metals throughout certain lands therein described, and to raise, make merchantable, and dispose of the same to their own use, and to make additions, &c. necessary for the exercise of that liberty, together with the use of all waters, and watercourses, excepting to the grant or liberty for driving any new addition within the lands thereby granted, and to convey any watercourse over the premises granted *habendum* for 21 years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c. and to work effectually the mines during the term, and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor. Held, that this deed did not amount to a lease, but contained a mere licence to dig and search for minerals, and that the grantee could not maintain an ejectment for mines, lying within the limits of the set, but not connected

nected with the workings of the grantee. 2 B. & A. 794. The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorized other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land, and pointed out the boundaries within which they were to exercise the liberty, and himself subsequently entered into a mining adventure with other persons, and was carried on within the limits described in the indenture, and afterwards in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for twenty-one years, and upon the execution of this lease the original deed was delivered up, but there was no surrender in writing. Held, that these acts amounted to a re-entry by the grantor, inasmuch as unless referred to the exercise of that right, they would be acts of trespass by him. Ibid. *A.* demised premises to *B.* for one year certain. It was agreed that after the expiration of that year, the tenancy should expire on three months' notice being given by *A.* The agreement contained no clause of re-entry. *B.* entered and took receipts for the rent from *A.*, first in his own name alone, and afterwards in the names of himself and two others, who were his partners. After three years' possession, he received a notice to quit from *A.* alone: Held, that *A.* might recover on his own demise in an action of ejectment, the notice to quit, *A.* alone being sufficient to determine the tenancy. 8 Taunt. 241.

4. To entitle joint tenants to recover in ejectment against a tenant, from year to year, the notice to quit must be signed by all the joint tenants at the time it is served, but if the notice be given by an agent it is sufficient if his authority be subsequently recognized; and therefore, where such notice was given by an agent under a written authority, which at the time of the service of the notice had been signed only by some of the several joint tenants, but afterwards was signed by all others: held, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit, was therefore sufficient. 3 B. & A. 689.

5. The defendant, in 1799, agreed to take the premises for seventeen years, at a yearly rent, and entered. In 1813, the plaintiffs contracted to sell the fee to *A.*, who thereupon bought from the defendant the residue of his term, and, without the assent of the plaintiffs, put in a new tenant, who occupied for two years. The contract for sale of the fee was then rescinded: held, that the plaintiffs were entitled to recover from the defendant, in an action for use and occupation, the rent from 1813, to the end of the original term, as there had been no surrender in writing of his interest, and as the plaintiffs had not assented to the change of tenancy. 8 Taunt. 270.

6. A lease by the warden and poor of an hospital under the corporation seal, made before the expiration of a former lease to a lessee, who then had only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding upon the succeeding warden and poor of the hospital. 3 B. & A. 711.

7. Where premises had been let to *B.* for a term determinable by a notice to quit, and pending such term *C.* applies to *A.*, the landlord, for leave to become the tenant, instead of *B.*, and upon *A.* consenting, agrees to stand in *B.*'s place, and offers to pay rent. Held, that (though *B.*'s term had not been determined either by a notice to quit, or a surrender in writing) *A.* might maintain an action for use, and occupation

occupation against C., and that the latter could not set up B.'s title in defence to that action. 1 B. & A. 50.

8. A. being tenant from year to year, underlet the premises to B. and the original landlord with the assent of A. accepted B. as his tenant, but there was no surrender in writing of A.'s interests; rent being subsequently in arrear, the landlord distrained on B.'s goods. Held, that these circumstances constituted a valid surrender of A.'s interest by act and operation of law, within the 29 Car. 2. c. 3. s. 3. 2 B. & A. 119.

9. Where a lesse covenanted that he would at all times and seasons of burning lime, supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their lands and repair of their houses: held, that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead, that there was no lime burned on the premises out of which the lessor could be supplied. 2 B. & A. 487.

Relative to contracts and covenants between.

10. A covenant by a lessor, to supply the premises demised (which were two houses) with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, and for the breach of which the assignee of the lessee may maintain an action against the reversioner. 4 B. & A. 266.

11. Covenant for quiet enjoyment during a term, "without the lawful let, suit, interruption, &c. of J. M. his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having or claiming any estate, or right in the premises, and that free and clear, and freely and clearly discharged or otherwise, by J. M. his heirs, executors, or administrators, defended, kept harmless, and indemnified from all former gifts, grants, bargains, sales, leases, mortgages, assignments, rents, and arrears of rent, statutes, judgments, recognizances, made or suffered by J. M., or by their, or either of their acts, means, default, procurement, consent or privity," preceded by a covenant, that the lease was a good lease, notwithstanding any act of J. M., and followed by a covenant for further assurance, by J. M., his executors, administrators, and all persons whomsoever claiming, during the residue of the term, any estate in the premises under him or them. Held, *Park J.* dissentiente, that the covenant for quiet enjoyment extended only against the acts of the covenantor, and those claiming under him, and not against the acts of all the world. 1 B. & B. 319.

12. A tenant was bound either to consume the hay on the demised premises, or for every load of hay removed, to bring two loads of manure; on quitting possession of the premises, he sold part of a rick of hay, then left standing to a purchaser, without mentioning his liability to bring manure. The incoming tenant refused to allow the purchaser to take away the hay until the manure was brought; after an interval of a month, during which time the hay had been considerably damaged, the latter consented that it should be removed; the purchaser, however, then refused to accept or pay for the same. Held, that although the bringing on the manure was not a condition precedent to the carrying off the hay as between the landlord and tenant still, and after the tenant had quitted possession of the premises, the succeeding tenant had a right to refuse or permit the hay to be removed till after the manure was brought on, and that as the vender had not enabled the purchaser to remove the hay in the first instance, he was not entitled to recover the price. 2 B. & A. 759.

13. By the custom of the country, the outgoing tenant was entitled to

to an allowance for foldage from the incoming tenant. Where a lease however specified certain payments to be made by the incoming to the outgoing tenant, at the time of quitting the premises, among which there was not included any payment for foldage: held, that the terms of the lease excluded the custom, and that the outgoing tenants was not entitled to any allowance in respect of foldage. 2 B. & A. 746. Where the lease also provided that the tenant should during the term, fold his flock of sheep, which he should keep on the demised premises, under a penalty, if he omitted to do so: held, *arguendo*, that this amounted to a covenant to keep a flock of sheep upon the premises. *Ibid*.

14. Where a party took seven-sixteenths of certain premises, the whole of which then were rated at the annual value of £5*l*. and the lessor covenanted to pay all taxes then chargeable on the premises, or any part thereof, or on the yearly rent thereby reserved, and the lessee covenanted to pay all fresh taxes, which should thereafter be charged upon the premises, or any part thereof: held, by *Bayly* and *Holroyd, J.s*, dissentiente *Abbott, C. J.*, that the true construction of these covenants was, that the lessor, should pay such taxes as were chargeable on the premises at the time of making the lease, considering them as of the annual value of seven-sixteenths of £5*l*. and that the lessee should pay all fresh taxes, formerly chargeable as were occasioned by the improved value of the premises. 3 B. & A. 647.

15. Upon a covenant to repair, and keep in repair during the continuance of the term, an action may be maintained for breaches committed before the term has expired. 1 B. & A. 584.

16. A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by there selling raw meat by retail, although no beasts were there slaughtered. 1 B. & A. 617.

Relative to the  
lessee.

17. In covenant by assignee of lessor against lessee for rent arrear, an allegation that the lessor was possessed for the remainder of a term of twenty-two years, commencing on, &c. is material and traversable. 1 B. & B. 531.

18. An occupier of lands having during a course of twelve years paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid. Held, that the occupier could not recover back from the landlord any part of the property-tax so paid. 1 B. & A. 128.

Relative to the  
assignee.

19. Where rent is paid by succeeding tenants after an adverse possession of twenty-three years, it does not amount to an atonement, unless the consent, or at least the knowledge of the landlord, can be shown. 6 Price, 146.

20. When a party takes an assignment of lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he has never occupied, or become possessed in fact. 1 B. & B. 238.

21. Where *A.*, being possessed of certain premises for a term of years, assigned part of them over to *B.* for the residue of his term, with a covenant for quiet enjoyment, and *B.* afterwards assigned them over to *C.* Held, that *C.*, having been evicted by *J. S.*, the lessor of *A.* for a breach of covenant committed by *A.* previously to the assignment to *B.*, might maintain an action against *A.* upon the covenant for quiet enjoyment, on the ground that there was a privity of estate between *A.* and *C.*; secondly, the declaration having set out the indenture

denture from *A.* to *B.*, in which it was recited that *J. S.* by indenture demised to *A.* the premises; and it afterwards appearing on the face of the declaration that *J. S.* had entered and ejected *C.* from the premises for a forfeiture. Held, that the court might particularly, after verdict, presume that *J. S.* had a title to the premises, although there was no express allegation of that fact; thirdly, when part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken, it is to be presumed, after verdict, that the jury were directed at the trial not to take that part into their consideration. 3 B. & A. 592.

22. *A.*, as administrator of *B.*, the lessee of certain premises, took possession of them on *B.*'s death, but paid no rent, the premises proved to be unproductive, and after eight months *A.* made a lessor or verbal offer to surrender them. In action brought against *A.*, in his own right for rent due after the decease of *B.*, held, that *A.* was not chargeable. 8 Taunt. 191.

23. Where goods seized under an extent had been kept by the officers for a long time locked up on the premises pending a reference of the prosecutor's claim, during which a subsequent arrear of rent accrues due to the landlord: the court refused to interfere in his behalf, so far as to order the effects to be sold, and the rent in arrear to be paid to him out of the produce. 6 Price, 19. *Semble*, his remedy is by action for use and occupation against the tenant, or case against the officer. *Ibid.*

Of the lessor's  
right on an  
execution  
against the  
tenant.

24. Where a sheriff, with knowledge that there is rent due to the landlord proceeds to sell the tenant's goods by virtue of a writ of *f. fa.* without retaining a year's rent, he will be liable for it although no specific notice has been given to him by the landlord. 3 B. & A. 645.

25. Under the statute of the 8th Anne, c. 14. the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands; and the court, upon motion, ordered the same to be paid to the landlord, even where the notice was given after the removal of the goods from the premises. 3 B. & A. 440.

26. In an action against the sheriff for removing goods taken in execution without paying the landlord a year's rent, it is not necessary to prove that a year's rent is due. It is sufficient to prove the occupation by the tenant. It lies on the defendant to shew that the rent has all been paid. Such a claim may be supported for forehand rent stipulated by the lease to be paid in advance, as being rent due within the statute of Anne, and such rent may be distrained for by the landlord, although he is aware that an execution is about to be sent down at the suit of a judgment creditor. If a landlord, who has distrained for rent, does not sell within the five days by arrangement made between them and the tenant, that is no proof *per se* of collusion. The jury having found a verdict for the defendant, under circumstances affording ground for the objections so over-ruled in this case, the court ordered a new trial. 7 Price, 690.

27. The common allegation of "the defendant well knowing the premises," in the declaration, will, after verdict, cure the omission of of an averment that the defendant had notice of rent being in arrear. So held on a writ of error founded on that objection. *Quære*, whether any other allegation of notice be necessary? *Ibid.*

28. In an action against a sheriff for removing goods seized under  
*a fieri*

a *feri facias*, without paying the landlord a year's rent under the statute of 8th Anne, wherein the plaintiff recovered a verdict, the court refused a new trial, on the ground that the goods having been afterwards returned, the plaintiff had not been damnified, because while they were in the custody of the law, the landlord could not distress them. The want of an allegation in the declaration that the sheriff had notice of rent due, is not the subject of a motion for a new trial, but should be moved in arrest of judgment. 7 Price, 566. The improved or rack rent mentioned in the 11 G. 2. c. 19. s. 2., is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on at the time of delivering the declaration in ejectment, in case the premises were then to be let. 2 B. & A. 652.

Of actions by  
landlord against  
tenant.

29. Demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised, the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all, but the sheriff, in executing the writ of possession by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig. Held, that although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent under the statute of 11 G. 2. c. 19., the landlord might recover the treble rent in respect not only of the demised premises, but that of the mines, in which the tenant had only liberty to dig. 2 B. & A. 652.

Of summary  
proceedings to  
recover possession.

30. Where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the year's rent. Held, that the landlord might properly proceed, 11 G. 2. c. 19. s. 16. to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same. 1 B. & A. 369. Held also, that it is not necessary to state in the record of the Magistrates proceedings that the landlord had a right of re-entry, although a right must exist in order to entitle the party to proceed under this statute. Ibid.

## LIBEL.

In civil cases.

1. The libel stated in the declaration, purported to be a speech of counsel at a trial of the plaintiff on a criminal charge, and it stated, after setting out the speech, that a witness was called and proved all that had been stated by counsel, and that the defendant was immediately after that acquitted, upon a defect in proving some matter of form. The plea stated that in fact such a speech was made, and that the witness called proved all that had been so stated, but it did not set out the evidence or justify the truth of the charges made in the counsel's speech. Held, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. 4 B. & A. 606.

2. Declaration for a libel published in a newspaper, plea that the libel was originally published in the *H. journal* by *J. S.*, and that at the time of publication by the defendant, it was stated in such publication

cation that it was copied from that newspaper, and that pursuant to statute 38 G. 3. c. 78. *J. S.* had made an affidavit that he was the publisher of the *H.* journal, and still remained so at the time of publication of the libel. Held, that this plea was bad, inasmuch as the publication by the defendant did not specify the name *J. S.* as the original publisher of the libel, but only named the journal. 4 B. & A. 605. *Semble*, that even if *J. S.* had been named by the defendant when the latter published the libel, such publication being of written slander, could not have been justified. *Ibid.* *Semble* also, that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified, unless such repetition be made without malice, and upon a fair and justifiable occasion. *Ibid.*

3. Declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, in substance as follows, and then set out the libel with innuendoes. Held, that this was bad in arrest of judgment. 3 B. & A. 503.

4. Declaration alleged that, before the publishing of the libel, a carriage in which one *E. S.* was riding, was passing on a certain highway, and that plaintiff was there driving another carriage, and that it happened, without any negligence, fault or furious driving on the part of the plaintiff, that the two carriages came in contact together, whereby the carriage in which *E. S.* was riding, was overturned, and the said *E. S.* was injured. The declaration then proceeded to allege that the defendant published a libel of and concerning the plaintiff, and of and concerning the said accident, and that allegation was made in every count of the declaration. The defendant pleaded, first, not guilty; secondly, justification to the whole of the libel in the first count of the declaration, and stated that the accident mentioned in the supposed libel, was the same accident mentioned in the introductory part of the declaration, and that it was occasioned by the careless and furious driving of the plaintiff. The defendant then pleaded a justification only as to part of the libel contained in the second count, that the said *E. S.* had been thrown from a chaise owing to the hard driving of the plaintiff, but there was no justification as to the other part. The jury found a verdict for the defendant on the justification, and they found a verdict for the plaintiff as to that part of the libel, to which no justification was pleaded. Held, that the word "accident," in this declaration, meant the collision of the carriages only, and that the allegation that that collision was occasioned by the furious driving of the plaintiff, was a separate and distinct allegation, and that the verdict therefore was right. 2 B. & A. 685.

5. Declaration for a libel concerning the plaintiff, in his profession as an attorney. The libel began, "Shameful conduct of an attorney," and then proceeded to give an account of proceedings in a court of law, which contained matter injurious to the plaintiff's professional character. The defendant pleaded, that the supposed libel contained a true account of the proceedings in the court of law. Held, after verdict for the defendant, that the plea was bad, inasmuch as the words, "shameful conduct of an attorney," formed no part of the proceedings in the court of law, and the plaintiff was therefore entitled to judgment. 3 B. & A. 702.

6. *Quære*, whether the mere writing of a libel with intent to excite hatred and contempt of the king's government, be an indictable offence, In criminal cases.

offence, assuming that the offence is not complete until publication? *Quære*, whether it can be tried in any county but in that where the publication took place? Defendant was indicted for publishing a libel in the county of *L.* The writing was dated from that county, and the defendant was seen there both on the day of the date, and the day following, and the letter was received by *A.* from *B.*, in the county of *M.*, open, accompanied with written directions to *B.* to forward it to *A.* for publication. *Quære*, whether this was evidence to go to the jury of an actual publication in *L.*? 3 B. & A. 717.

7. Where an information alleged that a libel was published of and concerning the government of the country, and the libel did not in express terms charge the acts to have been done by the government or its order, the court may take the whole libel together, to interpret it in the way in which ordinary persons would understand it, and to judge from the whole tenor of it, whether it be coming of, and concerning the government; and the court having come to this conclusion, such an information was held good after verdict, although the record did not contain any averment of *extrinsia* facts, in order to show that the libel was written of and concerning the government. 4 B. & A. 314.

8. Where the information alleged that the defendant intending to cause it to be believed, that divers subjects of our lord the king had been inhumanly killed by certain troops of our lord the king, published a libel of and concerning the said troops, and the only invende in the libel was applied to the word dragoons, meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down and killed by the said troops of our said lord the king. Held, after verdict that this was sufficiently certain, without defining what particular troops is meant. 4 B. & A. 314.

9. On an information for writing, composing, and publishing a libel, in the county of *L.*; it appeared that the defendant, on the 23d of August, wrote and composed the libel in *L.*, and that he was seen in *L.* on that and the following day. On the 24th the libel was delivered in the county of *M.*, (100 miles off,) by *A.* to *B.*, being inclosed in an envelope, addressed to *A.*, containing written directions to *A.* to forward the libel to *B.*, by whom it was subsequently published in *M.* The envelope was open, and it was not proved that there was on it any trace of a seal or post-mark. *A.* was not called at the trial as a witness by either party, nor was it proved that he was a resident, or had been about that time in *L.* Held by three justices (*dissentiente Bayley, J.*) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to *A.* in *L.* Held also by three justices (*Bayley, J. dubitante*), that a delivery at the post-office in *L.* of a sealed letter, inclosing a libel, is a publication of the libel in *L.* Held also by three justices, (*Bayley, J. dubitante*) where a defendant writes and composes a libel in *L.*, with the intent to publish, and afterwards publishes it in *M.*, that he may be indicted for a misdemeanor in either county. And per *totam curiam*, where a libel imputes to others the commission of a triable crime: held, that evidence of the truth of it is inadmissible. Held also, where, in summing up, the judge told the jury that the intention was to be collected from the paper itself unless explained by the mode of publication, or other circumstances, and that if its contents were likely to excite sedition, &c.; defendant must be presumed to intend that which his act was likely to produce, and that if

if they found such to be the intent, he was of opinion it was a libel, and that they were to take the law from him, unless they were satisfied that he was wrong; that this was a correct mode of leaving the question to the jury under 32 G. 3. c. 60. s. 1. *Quære*, whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence. 4 B. & A. 95.

### LIEN.

1. An actual possession given to a factor by a carrier, by order of the shipper, after his (the shipper's) bankruptcy, is not such a possession as will give him a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of it. Such an order rather operates to defeat his claim of lien, as being an act of ownership, exercised by the bankrupt. Nor is a delivery to a master of a vessel where the consignor had written to the consignee, apprising him that he has consigned to him, and requesting him, on the faith of such consignment, to accept bills (which he accordingly accepts and pays,) such a constructive delivery to a consignee as will give him a lien against the assignees. It is not within the principle of the cases, which decide, that an equitable right will supply the deficiency of an actual delivery, in support of a well-founded lien, not perfected by possession. Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment, are not equivalent in effect to bills of lading endorsed. 3 Price, 547.

On the creation  
of the right.

2. A shipwright has a lien upon a ship for repairs. 4 B. & A. 341.

Of the party  
entitled to.

3. A workman having bestowed his labour upon a chattel, in consideration of a price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid; and this, though the chattel be delivered to the workmen in different parcels, and at different times; if the work done under the agreement be entire. *Semble*, that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession, inconsistent with the terms of the contract. 5 M. & S. 180.

4. Where the owner of a ship having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it. Held, that such negotiation amounted to an approval of the bill by him and that it was a relinquishment of his lien on the goods. 3 B. & A. 497.

On the deter-  
mination of

### LIFE, TENANT FOR.

1. Although a surrender of a life-estate to the owner of the fee is, as between the parties, an extinguishment of the estate surrendered, yet may it have continuance to uphold a prior interest derived under it. Therefore, where *J. B. C.* having a lease for three lives of a manor, where, by the custom, the copyholds were demiseable by copy made, a lease for years by indenture of a copyhold tenement to defendant's father,

Surrender of  
his estate.

father, and afterwards the estate of *J. B. C.* was surrendered to the lord of the see, who made a lease of the manor to the lessor of the plaintiff. Held, that inasmuch as the lease to defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff should not avoid the same during the continuance of one of the three lives in the lease to *J. B. C.* notwithstanding the surrender of that estate. 5 M. & S. 146.

Its operation on  
rights of entry.

2. To avoid a fine, a husband claiming in right of his wife, must enter within five years after his title accrues. 3 B. & A. 474.

### LIMITATIONS, STATUTE OF.

Commence-  
ment of its  
operation.

1. Where *A.* under a contract to deliver spring wheat, had delivered to *B.* winter wheat; and *B.* having again sold the same as spring wheat, had, in consequence, been compelled, after a suit in Scotland, which lasted many years, to pay damages to the vendee, and afterwards *B.* brought an action of assumpsit against *A.* for his breach of contract, alleging as special damage the damages so recovered. Held, that although such special damage had occurred within six years before the commencement of the action by *B.* against *A.*, yet that the breach of contract, which, in assumpsit, was the gist of the action having occurred, and become known to *B.* more than six years before that period, *A.* might properly plead *actio non accrevit infra sex annos*. 3 B. & A. 288.

Its operation in  
relation to the  
forfeiture of an  
estate.

2. The statute of limitations is a good defence to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had been determined by a notice of quit. 1 B. & A. 625.

Operation of,  
how avoided.

3. Where upon demand made of payment of seamen's wages accrued during the Russian embargo, the defendant answered, "That he would not pay, there were none paid, and he did not mean to pay, unless obliged;" this was held sufficient to take the case out of the statute of limitations. 5 M. & S. 75.

4. Where it was proved that a defendant had, after having denied the existence of a debt demanded of him, replied to an assertion by the plaintiff, that he had documents in his possession which would prove it, that it is of no use for me to look at them, for I have no money to pay it now; the Court held that a nonsuit, which had been directed on such a case, made and relied on by the plaintiff, was right. The legal effect of such conversations, as to how far they are to be considered as admitting debts to be due, or amounting to promises to pay them, is a question rather for the determination of the Court than the jury. 5 Price, 696.

5. Trespass for breaking and entering coal mines, and taking away coals; Plea, in *actio non accrevit infra sex annos*; to which the plaintiff replied in the affirmative at the trial, no evidence was given to shew that the trespass was actually committed within six years: held, that evidence of a promise to make compensation, made by defendant before the commencement, and when he was threatened with an action for taking away coals, was not sufficient to support this issue, by which the plaintiff was bound to prove the affirmative, that he had  
a good

a good cause of action within six years before the commencement of the suit. 1 B. & A. 92.

6. One of two joint drawers of a bill of exchange, becomes bankrupt, and under his commission, the indorsees prove a debt (beyond the amount of the bill) for goods sold, &c., and they exhibit the bill as a security they then held for their debt, and afterwards receive a dividend. Held, in an action by the indorsees of the bill against the solvent partner, that the statute of limitation was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years. 1 B. & A. 463.

7. Defendant having entered into a guarantee in writing, and become liable upon it, at a period of more than six years; before the commencement of the suit, verbally promised, within six years, that the matter should be arranged; and afterwards, on an action being brought, pleaded *actio non accrevit*, &c. Held, that the statute of frauds having been once satisfied by the original promise, being in writing, it was not necessary, in order to take the case out of the statute of limitations, that the latter promise should also be in writing. 1 B. & A. 690.

8. Assumpsit on a promissory note. Plea, first, general issue: secondly, statute of limitations; but there was no plea or notice of set-off. It was proved that on the plaintiff's shewing the defendant the note within six years, the latter said, "You owe me more money; I have a set-off against it." Held, by *Bayley* and *Holroyd*, Justices, (*Best*, J. dissentiente,) that that was not a sufficient acknowledgment within six years, to take the case out of the statute of limitations. 2 B. & A. 759.

9. Where, in a deed between defendants and a third person, defendants acknowledged within six years the existence of a debt, and the plaintiffs were wholly strangers to the deed: held, this was sufficient to take the case out of the statute of limitations. 3 B. & A. 131.

10. A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount of the floating balance in his hands. *Quære*, whether in order to take the case out of the statute of limitations, evidence is admissible, to shew that the bill had never, in fact, been paid in this manner? 4 B. & A. 568. *Semble*, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly, that it is impossible it could be discharged in any other manner than that specified. *Ibid*.

11. To a declaration in an action, on the case founded *in tort*, a plea of not guilty of the grievances mentioned in declaration within six years, is bad, upon special demurrer. 3 B. & A. 448. Pleadings relative to.

12. Declaration in assumpsit stated as a breach, that the defendant did not diligently and sufficiently make a search at the bank of England to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do: The omission to search took place more than six years before, although it was not discovered by the plaintiff till within the six years. Held, that the statute of limitations having been pleaded, that, upon this form of declaration, the plaintiff was not entitled to recover. On the discovery being made, the defendant said the neg-

lect arose from the omission of his clerk, and that he was responsible. Held, that upon this record, such an acknowledgment was not sufficient. 3 B. & A. 626.

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### LONDON.

Aldermen.

1. On the charter day for the election of lord mayor of the city of London, the business of the election ought to have precedence of all other matters, and therefore it is not lawful, after the lord mayor and aldermen having retired from the hustings, to propose any other business inconsistent with the election, the discussion of which may have the effect of putting it off altogether. 3 B. & A. 668.

Court of Requests.

2. The statute 39 and 40 G. 3. c. 104. extends to assignees of a bankrupt; and therefore where a plaintiff, as assignee, recovered less than 5*l.* the Court ordered suggestion to be entered on the record, to deprive the plaintiff of costs; but defendant having given notice of his intention to dispute the petitioning creditor's debt, &c. (which was proved at the trial) it was holden, that the plaintiff was entitled to the costs thereby occasioned, and the Court ordered a suggestion to be entered accordingly. 1 B. & A. 367.

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### MANDAMUS.

When it will lie.

1. Under the 13 G. 3. c. 63. the court will grant a *mandamus* to the court in *India* to examine witnesses on behalf of the defendant in a civil action. 1 B. & B. 519.

2. Where a rail-way was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same, the company having afterwards taken up the rail-way: held, that a *mandamus* might issue to compel the company to reinstate and lay down again the rail-way. 2 B. & A. 646.

When not.

3. The court will not grant a *mandamus* to a trading corporation, at the instance of one of its members, to compel them to produce their accounts for the purpose of declaring a dividend of the profits. 2 B. & A. 620.

4. The Court of King's Bench have no jurisdiction to grant a *mandamus* to magistrates, to make an order of maintenance on a particular parish. 4 B. & A. 298.

Form of the writ.

5. A writ of *mandamus* to a corporation commanding them to pay a poor's rate, omitted to state that the defendants had no effects upon which a distress could be levied. Held, that this was a fatal objection to the writ, and might be taken after the return, or at any time before the issuing of the peremptory *mandamus*. *Quære*, whether in such a case a *mandamus* will lie? 3 B. & A. 220.

Return of the writ.

6. A *mandamus* to the mayor of *M.* to convene a meeting to proceed to an election, in order to fill up five vacancies in a select body, consisting of fifteen chief burgesses. Return by him, after stating objections to the titles of several of the remaining burgesses, that there were not within the borough eight legally elected chief burgesses, by whom the election of others could be made, and that for the several reasons before mentioned, he could not proceed to such election. Held, insufficient return, and peremptory *mandamus* awarded. 4 B. & A. 496.

MANOR.

## MANOR.

It is a good custom in a manor, that the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor. 2 B. & A. 550. Custom of.

## MARKET.

An act of parliament, the preamble of which recited the grant of a market, and that it was expedient that provision should be made for the better regulating of the market, and for the more easy collection of the tolls and dues payable in the market, enacted, "That it should be lawful for the owner of the market to take from all persons who should place, pitch, or expose for sale within any part of the market, any fruit, &c., all such tolls as are usually collected or taken within the said market, or which are payable for or in respect of the same." Held, that the owner of the market, although not entitled at common law to any toll, might, under this clause of the act, recover such tolls, as at the time of passing of this act were usually paid in any part of the said market, and that, although the tolls then usually paid in respect of the same articles were different in different parts of the market. 3 B. & A. 366. Statutes.

## MARRIAGE SETTLEMENT.

1. A. by marriage settlement conveyed certain estates to trustees, with remainder to his children of the marriage, share and share alike, as tenants in common, and for default of such issue, and if any of such children, there being more than one, shall happen to die without issue before twenty-one, that in every such case, the share of such child should go to the survivors as tenants in common; and in case all such children should die without issue, then to the use of the settler in fee. Held, that there were no cross remainders between the children of the marriage, except in the case of a child having died without issue and under twenty-one, and that one of the children having died without issue, but after twenty-one, that his share vested in the settler and not in the survivor. 2 B. & A. 810. Construction of.

2. Where a marriage settlement conveyed an estate to trustees for the use of settler for life, then to the use of his wife for life, and then for the use of his first son and the heirs of such first son, and from and immediately after the determination of that estate for the use of his second, third, and all and every other son or sons, and their several and respective heirs; and for default of such issue, then to the use of all and every his daughter and daughters, and their heirs, to take as tenants in common, and not as joint tenants, and for want of such issue, then for the right heirs of the survivor of himself and his wife for ever. Held, that under these limitations the sons took successively estates tail and the daughters an estate in fee. 2 B. & A. 126.

3. Where husband and wife granted to trustees an estate, of which the wife's father was seized in fee simple, and afterwards in the life of the father, they levied a fine of the lands to the uses of the settlement, and the father afterwards died, leaving the wife one of the co-heiresses. Of property liable to the trust of.

heiresses. Held, that her moiety of the estate became subject to the uses of that settlement, by reason of the fine as an estoppel against the husband and wife, and all persons claiming title under them. 2 B. & A. 242

### MASTER AND SERVANT.

Liability of  
master for  
servant's mis-  
conduct.

The defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters. A customer, to whom a bill written by the daughter had been sent by the daughter, being advised by the plaintiff, that the charge was too high, sent it back; it was returned to her, inclosed in a letter also written by the defendant's daughter, which constituted the libel. Held, that in an action for the libel, this evidence was not sufficient to fix the defendant. Secondly, it was also held, that the daughter in such case could not be called as a witness to prove by whose direction the letter was written. 8 Taunt. 42.

### MAXIMS.

Municipal.

Long established forms and precedents of common assurances adopted in general and approved practice by conveyancers of acknowledged professional skill, are of great authority in the absence of decided cases, in the determination of questions which regard the validity of the various legal instruments by means of which the disposition of real property is usually effected. 7 Price, 281.

### NAVY.

Officers of.

A Licence to C. and H. (who were ship brokers in London,) on behalf of themselves and *British* or neutral merchants, to load and export a cargo on board the *Russian* ship *Fortuna* from London, to any port in the *Baltic* not under blockade, was held to protect *Russian* property exported from this country on a voyage to a *Russian* port, *Russia* being at War with *Great Britain*. 5 M. & S. 25.

### NEWSPAPER.

Relative to the  
printer.

An action for work and labour cannot be brought for printing a work distributed weekly as a newspaper, unless the printer comply with the provisions of the statute 38 G. 3. c. 78. *Quære*, whether the action could be maintained by a printer of intermediate numbers (the first and last numbers being printed by another person) of a volume of a work published half yearly, if the name of the printer of the first and last numbers at the beginning and end of the volume? 8 Taunt. 142.

### NEW TRIAL.

In civil cases.

1. Where a legal objection is taken at the trial, and over-ruled by the judge without reserving the point, and the court are afterwards

of opinion, that that objection was a good ground of nonsuit, they will grant a new trial only, and will not permit a nonsuit to be entered. 1 B. & A. 252.

2. The court will in some cases grant a new trial of an ejectment, where a verdict has been found for the defendant, as where the lessors of the plaintiff have since the trial discovered, that they had conclusive evidence of a material fact, (the marriage of their ancestor), which they failed to prove at the trial in consequence of mistaking the Christian name of the person to whom the ancestor had been married, and where it is expected that they may be obliged to enter to avoid a fine intended to be levied before a new ejectment can be brought. 7 Price, 677. But they will only do so on terms of the costs of the former trial, and the application for the new trial being first paid. *Ibid.*

3. Where a bill of exchange, which had been returned by the holder, indorsed by him generally, (who had received it from the payee endorsed also by him generally) to the drawers with other bills and money, in consideration of another draft for the whole amount, and which bill was then remitted by them (the drawers) to a bill broker under cover in a letter addressed to one of the firm of a banking house, (who were the drawers, but who had not accepted,) accompanied with orders to the broker by the same letter to get the bill discounted, and to pay over the proceeds to the banking house, had been seized by a sheriff in possession of the banking house, &c. under an extent, whose officers received it from the post-man, at the time of the arrival of the letter in which it was inclosed. *Quære*, whether, under such circumstances, the banking house had such a property absolute or qualified in the bill as would support an issue, that such second indorser was indebted to the banking house in the amount of the bill?—*Note.* The court granted a new trial on an objection taken to the verdict especially, found for the crown under such circumstances, that the facts did not support the affirmative of such an issue, expressing themselves desirous of having before them a fuller state of facts, but giving no opinion on the point of law. 5 Price, 173.

4. Plaintiff, an infant, entered into partnership with an adult. The partners took a lease of premises from the defendant for the purpose of carrying on their trade, the premium for which lease was paid for half by the infant in cash, and the other half by bills drawn by the defendant and accepted by the plaintiff in the joint names of himself and partner. The infant the day after he became of age dissolved the partnership, and four months after such dissolution, the defendant sued the audit partner alone on one of the bills, accepted a surrender of the lease from him, abandoned his action and destroyed the other bills. Held, that these facts ought to have been left to the jury to determine, whether the defendant had not dispensed with formal notice and disaffirmance of the contract, and that the plaintiff had been improperly non-suited. 8 Taunt. 35.

5. In covenant by lessor against lessee upon a lease reserving an increased rent for every acre of certain lands, converted into tillage, the jury by their verdict having given damages for the actual injury sustained, instead of the increased rent, the court will not refuse the plaintiff a new trial, on the ground that the verdict was consistent with justice; secondly, the judge having expressly directed the jury to find damages to the amount of the increased rent, the court granted the new trial without payment of costs. 3 B. & A. 692.

6. The court will not disturb a verdict in an action of trespass to land on the mere ground of the judge at *Nisi Prius*, having directed the jury that the weight of evidence was with the other party, where he does not report himself dissatisfied with the finding. 6 Price, 146.

7. The court will not grant a rule for setting aside a verdict on the affidavit of the failing party stating that one of the jury was a relation of the successful party, and that they were in habits of friendship and intimacy together, and particularizing the various instances and expressions on the part of the jurymen, of partiality and prejudice, which are detailed in the body of the case. 7 Price, 203.

8. Where a verdict was found against a defendant, and a material witness for him arrived on the following day, the court refused to grant a rule for a new trial, because no application had been made to put off the first trial. 8 Taunt. 236.

9. Where the plaintiff being possessed of house and land in *E.*, had for sixty years exercised rights of common in *W.*, but it appeared that this was done near the boundary of the two commons of *W.* and *E.*, which lay open and uninclosed adjacent to each other, and it also appeared that the parties exercising the right did not at the time know the exact boundary, and that plaintiff had on a previous inclosure of the *E.* common, obtained an allotment there in respect of his estate. Held, that the judge was right in leaving it to the jury to say, whether the evidence was referable to an exercise of the right in *E.* and a mistake of the boundary, or to an exercise of the right in *W.* 4 B. & A. 428.

10. Upon the trial of an information for a libel, only ten special jurymen appeared, and two talesmen were sworn on the jury. It is no ground for a new trial that two of the non-attending special jurymen named in the panel had not been summoned, though it appeared that this fact was unknown to the defendant until after the trial. 4 B. & A. 430.

11. Where the judge is stopped by a jury in summing up in favor of one of the parties, declaring themselves satisfied, and finding immediately for the other, it is good ground for a new trial. 6 Price, 36.

12. The court will not order a party who is in prison applying for a new trial on the ground of excessive damages, having been given against him to pay the costs of the former trial, before the plaintiff's counsel proceed to show cause against the rule. 4 Price, 307.

13. When upon setting aside a verdict for plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the trial. 1 B. & A. 566.

14. Plaintiff having obtained a verdict, the court on the application of the defendant granted a new trial, on the ground that the judge had misdirected the jury in point of law, but the rule of the new trial was silent as to costs. The defendant without going to trial gave the plaintiff a *cognovit*, and the court held that the defendant was liable to pay the costs of the trial. 2 B. & A. 317.

15. Where the defendant has been acquitted on an indictment for not repairing a road, the court will not grant a new trial, yet they will, under very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question re-considered upon another indictment with the prejudice of the former judgment. 1 B. & A. 63.

In criminal  
cases.

OFFICE

## OFFICE AND OFFICER.

1. Where at a corporation meeting for the purpose of electing honorary freemen, a list of names was proposed, upon the whole of whom the vote was taken collectively instead of individually: Held, that such election was void, even where the corporation consisted of an indefinite number. 2 B. & A. 707. Office.

2. The steward of a court baron is a judicial officer, and trespass will not lie against him where his bailiff, by mistake, took the goods of B. under a precept commanding him to take in execution the goods of A. 2 B. & A. 473. Officer.

3. The 37 G. 3. c. 143. s. 1. by which the justices at their respective petty sessions within the divisions, districts, and other places of the several counties of England, are authorized to appoint examiners of weights and balances, extends only to such divisions, &c. as were known and recognized at the time when the act passed, and therefore such appointment made at a petty sessions by two justices for a district, which they had, without the consent of the other magistrates, created within the last five or six years, was held to be illegal. 1 B. & A. 588.

## OUTLAWRY.

1. A *capias quære clausum fregit* issued against A. and B., with an *ac etiam* in debt upon which A. was arrested. A special origin in debt, or *capias alias* and *pluries*, and writs of exigent issued against both; there was a supersedeas as to A., and exigent returned that B. was outlawed on the 23d October, and on the 26th November a declaration in debt was delivered against A., entitled of Trinity Term, averring the outlawry of B.: Held, that the delivery of the declaration was regular; but that, as it was entitled previously to the outlawry, it was wrong. The court, however, allowed it to be amended to payment of costs. 8 Taunt. 187. Of a co-contractor.

2. The defendant need not appear before he moves to reverse an outlawry, and where he did not go or continue abroad for the purpose of avoiding process, the court will, on motion, reverse the outlawry, and order the recognizance to be taken in the alternative and not for the payment of the condemnation money absolutely. 1 B. & A. 731. Reversal of.

## PARLIAMENT.

1. A clothier who contracts with the colonel of a regiment with army clothing, is not thereby incapacitated by stat. 22 G. 3. c. 45. from being elected as a member to serve in parliament. 1 B. & B. 25. House of Commons.

2. Upon process by original writ against a member of parliament, the summons omitted to describe him as having privilege of parliament; and the notice at the foot stated, that, in default of his appearance on the return-day of the writ, plaintiffs would cause an appearance to be entered for him: Held, that the summons was sufficient. 5 M. & S. 321.

## PARTITION.

**Miscellaneous.** *A. and B., tenants in common, having agreed to divide their property, and that Blackacre should belong to A.; the occupier of Blackacre, who after this agreement had paid his whole rent to A., cannot, in an ejectment brought against him by A., object that the partition-deed between A. and B. is not executed.* 1 B. & B. 11.

## PARTNER.

**Who are considered as.** 1. A merchant in *London* recommended consignments to a merchant abroad, and it was agreed that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses. Held, that this was a participation in profit, and constituted a partnership between the parties *quoad hoc*. 4 B. & A. 663.

**On the authority of one partner to bind the firm.** 2. *Semble.* A partnership firm may protect themselves from liability to pay bills accepted by one in the name of all the firm, by notice by public advertisement in newspapers, proved to have been received by the payee and indorsees, that the partnership is dissolved; although the dissolution has not appeared in the Gazette, and that even where the partnership is not for a definite and limited period, or might be dissolved at pleasure, but is for a stipulated continuing term, dissoluble only on certain conditions which have not been performed, so that it is doubtful whether the partnership continue to exist in point of law or not, and there was no special contract among themselves that the firm was not to be liable for the acts of individual partners. 7 Price, 193.

3. Where one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, and the business is afterwards transacted by or with the knowledge of the other partner: Held, that he is bound by the contract made by his partner. 2 B. & A. 673.

4. Held also, the supposed purchases having been represented to have been made at a certain rate per pipe, that A. might maintain an action for money had and received, to recover the specific sums advanced for the number of pipes of wine accounted for. *Ibid*.

**On the responsibility of partners for each other.** 5. A. employed B. and C., who were partners as wine and spirit merchants, to purchase wine and sell the same upon commission. C., the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit. The proceeds of such supposed sales he paid to A., and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine; the transactions were wholly fictitious; but B. was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A. as the proceeds of that part of the wine alleged to be resold than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for: Held, that B. was liable for the false representations of his partner, and that A. was entitled to retain the money that had been paid to him upon these fictitious transactions as if they were real. 2 B. & A. 795.—Under a declaration containing only one set of counts, charging the defendant

in

Of suits against.

in his own right, the plaintiff may recover one demand due from the defendant individually, and another due from him as surviving partner. 1 B. & A. 29.

6. In an action against other partners on a bill accepted by one in the name of the firm, the admissions in his answer filed to a bill in equity against him, are not admissible in evidence against the rest. If the plaintiff in such action be an indorsee, the defendants must shew that the payee had notice of the resolution of the rest of the firm to dissolve the partnership, and be no longer answerable for any such bills; and if that be not done, it is not sufficient to prove that the indorsee had notice, for he is entitled to avail himself of any circumstance which would operate in favour of the payee. 7 Price, 193.

7. A creditor is entitled to sue a dormant partner of his debtor, if unknown to him to be so at the time of furnishing the subject matter of the debt, for whatever had been supplied to the firm during the partnership. It is not an answer to the circumstance on which the reason of the rule is founded, the partnership not having been known to the plaintiff; that it might have been known to him if he had used diligence, inasmuch as the defendant, the partner, not originally known, had been a registered part-owner of the ship on account of which the goods had been supplied at the time, because the register is not readily accessible, nor conclusive when found. None of the acts done by an ostensible partner, which are usually held to operate to discharge the others, such as selecting one, accepting new bills, &c. will operate to discharge a partner not known to the creditor, if done during the time of the concealment of such partner. 3 Price, 538.

Relative to a dormant partner.

8. The joint-owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction. 4 B. & A. 437.

9. A person depositing money with bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank and of other persons, discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period of four years, and until they become insolvent. 4 Price, 200.

In relation to a dissolution of partnership.

10. Upon the dissolution of a partnership, it was agreed between the partners, that one of them should take upon himself to discharge a debt due to A. A. was informed of this, and expressly agreed to exonerate the other partner from all responsibility. Held, that those circumstances did not constitute any defence to the latter in an action by A. against both partners. 3 B. & A. 611.

11. Where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retaining possession of the original bills: held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. 2 B. & A. 210.

PARTY-

## PARTY-WALL.

On the liability  
for the expences  
of.

The assignee of the lessee of premises at a fixed rent, which he considerably improved and thereby rendered of greater annual value, is not the owner of the improved rent, within the 14 G. 3. c. 78. 2 B. & A. 467.

## PATENT.

Subjects of.

1. *Quære.* Whether a patent can be good if obtained for a mere process to be carried on by known implements or elements, or elements acting upon known substances, inasmuch as the word "manufacture," in 21 Jac. c. 3. seems rather to be confined either to some new article, or to some new instrument, or part of an instrument, to be used in making an article previously well known: And held, that, at all events, no merely philosophical or abstract principle can answer to that word, or be the subject of a patent. 2 B. & A. 345.

Specification.

2. Patent for "a new or improved method of drying and preparing malt." In the specification it was stated, that the invention consisted in exposing malt, previously made, to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process, nor the utmost degree of heat which might be safely used, nor the length of time to be employed, nor the exact criterion by which it might be known when the process was accomplished. Held, that the patent was void, inasmuch as, 1st, the specification was not sufficiently precise; and as, 2dly, the patent appeared to be for a different thing from that mentioned in the specification. Held also, that the word malt was here not to be taken in its usual sense, viz. of an article used in the brewing, but only in the colouring of beer; that in the patent here, it was necessary to have stated the purpose to which the prepared malt was to be applied, and to have said, that it was obtained for a new method of drying and preparing malt to be used in the colouring of beer. 2 B. & A. 345.

## PAYMENT.

In discharge of  
debts.

1. Where a bill of exchange, payable at the house of A., had been there presented for payment, and dishonoured, and the acceptor afterwards remitted to A. a sum of money for the purpose of enabling him to pay the dishonoured bill, and also another of less value; and A. in answer, stated the fact of the bill having been dishonoured, but added, that the money received should be carried to the acceptor's account, and did afterwards pay the smaller bill: Held, that the holder of the original bill could not maintain an action against A., there being no privity between them. 3 B. & A. 648.

Of money into  
court.

2. Production of plaintiff of a rule obtained by defendant for payment of money into court, and the master's allocatur of a certain sum for costs, is sufficient evidence of the plaintiff's election to take the sum paid into court, and if he afterwards proceed for the costs taxed and not paid, he need not prove a previous demand at the trial. 7 Price, 674.

3. After payment of money into court by a defendant, in an action brought

brought against him on the 2 & 3 Edw. 6. by a farmer of tithes, he cannot object to the plaintiff's title to the tithes, because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of the damages. 4 Price, 58.

4. Payment of money into court, generally on the whole a declaration, admits the contract as stated in each count, and a breach of it, and that something is due on each count thereon; but it does not admit the amount of the breach there stated. 2 B. & A. 116.

5. The order made on motion to pay money into court, that the defendant shall pay the costs, is imperative in that respect in this court, and if not paid when taxed, the plaintiff may have an attachment against the defendant for non-payment, which process, in the exchequer is final, and in the nature of an execution, and therefore not bailable. The plaintiff may, however, proceed to try the cause if the costs are not paid, as is his only course in the court of K. B. 6 Price, 126.

6. An action was brought for two separate sums of money, one of which, the defendant offered to pay, with all costs to that time; the plaintiff's attorney refused to stay proceedings on those terms, and the defendant paid that sum into court, but the plaintiff afterwards finding that he could not support the action for the other part of his demand, took the money out of court; and discontinued the action. The court allowed the defendant his costs from the date of his offer to pay the sum into court, and directed that the same should be set off against the plaintiff's costs previously incurred. 2 B. & A. 776.

#### PEACE, ARTICLES OF.

A justice of the peace is authorized to require surety of the peace for a limited time, according to his discretion, and need not bind the party over to the next sessions only. 2 B. & A. 278. Duration of.

#### PENAL ACTION AND INFORMATION.

1. Where an act of parliament, in the enacting clause, creates an offence, and gives a penalty in the same section, there follows a proviso containing an exemption, which is not incorporated with the enacting clause by any words; of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration. 1 B. & A. 94. Of the declaration in.

2. An objection to a count in an information on the 8th Anne, c. 7. s. 17. charging that the defendant was assisting or otherwise concerned in the unshipping prohibited and unaccustomed goods; that it is a charge of two distinct offences by the same count, and therefore bad, either for duplicity or uncertainty; was not allowed by the court, who held, that the words did not involve two distinct offences; that it was the established and ancient practice, *cursu scaccarii*, so to charge the offence in such informations. 4 Price, 122.

3. A defendant, who has been arrested on a revenue information filed against him, and has entered into a recognizance of bail to appear and answer, cannot move to discharge such recognizance, on the ground of the attorney-general not having proceeded to trial, according to notice, till after three clear terms (exclusively) have elapsed after the time for which notice of trial had been given, not after Of the trial in.

after issue joined. Thus, a defendant arrested in Michaelmas term, having given bail in December, and pleaded in Hilary term, and received notice of trial for the subsequent sittings, cannot move it after Trinity, nor until after Michaelmas term. 6 Price, 83.

4. *Quære*, whether in case of an information filed by the attorney-general, where the defendant has put in his answer, and the attorney-general has not replied, or otherwise proceeded for three terms, the defendant may, on motion, obtain an order that he may go without day. A motion made for such an order, was directed to stand over, to abide the result of a search for precedents. 6 Price, 85.

5. Notice of trial of information given, from time to time, from the sittings after Easter term 1818, till the sittings after Michaelmas, when it was given for the sittings after the next Hilary term, (the trial having been postponed for defect of special jurymen,) and the cause was not tried on the last occasion, on account of the absence of a material witness for the crown, who being expected till the last moment, the notice was not then countermanded. Held, a sufficient proceeding effectually to prevent the recognizance of bail being vacated, as it may be, where the attorney-general has not taken any effectual proceedings for three successive terms. 7 Price, 557.

Of the evidence  
in.

6. The master of a homeward-bound vessel, coming up the *Thames*, proved to have hired and sent off a boat and men, accompanied by one of his own crew, to bring away certain boxes of foreign and British glass, lying on the sands, on the *Essex* coast, to be landed at *Woolwich*, which they find, and bring as far as *Gravesend*, where the whole is seized by the custom-house officers; held, to be sufficient for a jury, of being concerned in unshipping foreign glass without payment of duty; and in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction. 6 Price, 198.

Of amend-  
ments in.

7. The court refused, on cause shewn, to discharge a side bar rule, allowing the attorney-general to amend an information for penalties incurred under the excise laws, on payment of costs, as to ten new counts which had been added, charging other offences, laid on days long subsequent to those in the original information, and to the filing of that proceeding, and the issuing of process thereon; and although the name of a succeeding attorney-general had been introduced; and although the defendant was served with process on the first information in Easter vacation, returnable the first day of Easter term; and the side bar rule for amending, was not obtained till the first day of the following Michaelmas term, nor the information so amended filed, till the sealing day after Michaelmas term. 5 Price, 363.

Of compound-  
ing and staying.

8. The statute 18 Eliz. c. 5. which prohibits the compounding of any offence, upon colour of pretence of process, or without process, upon colour of any offence against any penal law, does not apply to any offences cognizable only before magistrates, and an indictment for compounding such an offence was holden bad in arrest of judgment. 1 B. & A. 282.

Miscellaneous  
practice relative  
to.

9. The Court will not make an order that the witnesses of a defendant, claiming goods seized by the customs, may be allowed to inspect them before the trial of the usual information in remainder, on an affidavit of the party, that he believes he shall be able to prove, by such witnesses, that the goods are not contraband, but were made in this country, and for the most part by the witnesses, who were required to be allowed to see them. 4 Price, 381.

## PENAL STATUTE.

1. Where a brewer is liable to the penalties imposed by the 51 G. 3. c. 87. for receiving and taking into possession the articles prohibited by that statute to be received into possession by brewers, it is no defence to an information founded thereon, that such brewer, besides his trade of brewer, exercised another trade (*ex. gr.* a distiller) in which the use of such articles be lawful and necessary, and the article was found on his distillery premises. An information on such a statute, charging or "receiving, and taking into possession," is not maintainable, where it is proved that the act of receiving was antecedent to the statute, although the possession has continued ever since. 5 Price, 195. Construction of.

2. When a return to a habeas corpus, stated that a vessel with smuggled goods on board found at the fish market, within the limits of the ancient town of *Rye*. Held, that it did come within the 24 G. 3. sess. 2. c. 47. s. 1. by which, if a vessel be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, with smuggled goods on board, she becomes liable to forfeiture. 4 B. & A. 294.

3. In an action founded upon the statute 25 G. 2. c. 36. by one of the two inhabitants who had given information, &c. to the parish constable of *A. B.* keeping a bawdy-house, in consequence of which *A. B.* was prosecuted to conviction, it is necessary in order to entitle the plaintiff upon such conviction to recover the reward of 10*l.* from the overseers, that the prosecution should have been conducted by the parish constable, and therefore where the two inhabitants had taken upon themselves to conduct it, it was holden that they were not entitled to the reward, and that a demand upon the overseer, stating the prosecution so to have been carried on, was insufficient to entitle them to an action for the double penalty given by the act in case of a neglect or refusal by the overseer to pay such sum of 10*l.* on demand. 1 B. & A. 694.

4. A parcel containing bank notes, stamps, and a letter, were sent by a common carrier from one stamp-distributor to another: held in an action against the carrier, that the circumstance of the letter accompanying the stamps was *prima facie* evidence that it related to them, so as to bring the case within the proviso of the 42 G. 3. c. 81. s. 6. which enacts, that the prohibition to send letters otherwise than by the post, shall not extend to letters sent by any common carrier, with and for the purpose of being delivered with the goods that the letter concerns; and that the defendant not having proved the letter to relate to any other subject matter, was liable for the value of the parcel. 1 B. & A. 461.

5. The setting up of a private still, without entry at the excise, or licence, is an offence subject to the penalty of 20*l.* only, and not 200*l.*, and therefore a conviction for such an offence in the latter penalty was quashed. 1 B. & A. 390.

6. The exception in 12 G. 3. c. 61. s. 11. of mills or other places then used for making gunpowder, &c. does not apply to the limits first mentioned in that clause, but only "to the other part of *Great Britain*," not within those limits, and therefore an information charging the keeping more than the allowed quantity of gunpowder within the specified limits need not negative this exception. 1 B. & A. 362.

7. A

7. A farmer furnished the produce of his land to the poor of the parish, of which he was churchwarden, at a fair market price : Held, that he was liable to penalties under the 55 G. 3. c. 137. s. 6. 8 Taunt. 239.

8. The statute 55 G. 3. c. 137. s. 6. only prohibits churchwardens or overseers from supplying the workhouse, or the poor of the parish generally, and therefore, where an overseer receiving an order for the relief of J. S., an individual pauper, paid J. S. part in money, and by the consent of J. S. gave her the remainder in goods from his shop. Held, that he was not liable to the penalty of 100*l.* imposed by the act. 3 B. & A. 145.

9. The term "found" in the 11 and 12 W. 3. c. 10. s. 2. is as there used a word equivalent in import to having been seen or discovered, and held not to be confined to a finding by officers, or other persons seeking the thing for the purpose of seizure, or with intent to institute proceedings for the recovery of penalties or other hostile motive. A charge of the thing being "found in the custody of the defendant," in an information by the attorney-general on that statute, held to be supported by proof of its having been seen in his possession, knowingly and illegally, and exhibited by him as his property at any time and under any circumstances. 6 Price, 383.

10. The statute 56 G. 3. c. 110. is general, and extends to all tanners, whether using bark or sumack, and the penalty imposed on the removing and concealing any hides or skins from the view of the officer is cumulative on the penalty imposed by the 9th of Anne, c. 11. s. 17. 7 Price, 533.

11. The 21 Jac. 1. c. 7. provides, that any alehouse-keeper suffering inhabitants of the parish to tipple, may be convicted on the oath of one witness, and the 1 Car. c. 4. extends the same penalty to the case of strangers, but requires proof by two witnesses. Held, therefore, that a conviction stated to be on the oath of one witness against an alehouse-keeper for permitting persons to tipple in his alehouse, was bad, for not stating whether those persons were inhabitants or strangers. 3 B. & A. 596.

### PENALTY.

Relative to the  
H. 8. & 9  
W. 3.

1. After a plea of *non est factum*, and that the bond was obtained by fraud and covin where breaches are not assigned in the declaration, the plaintiff may suggest them under statute 8 and 9 W. 3. c. 11. in making up the issue. 5 M. & S. 60.

2. Bond conditioned for the payment of a principal sum in the year 1820, with interest in the meantime, half yearly, an action having been brought for the penalty upon a breach of the condition in non-payment of half a year's interest on the 29th September 1817, the court refused to lay the proceedings before judgment on payment of the interest due, although the non-payment of the interest was owing to a slip. 1 B. & A. 214.

### PLEADING.

Demurrer.

1. Where a sham plea was pleaded, calculated to raise issues, requiring different modes of trial, the court suffered the plaintiff to sign judgment as for want of a plea, and made the defendant, or his attorney,

attorney, pay the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. 2 B. & A. 197.

2. Where the sham plea was such as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expence, the court suffered the plaintiff to sign judgment, and made the attorney pay the costs. 2 B. & A. 199.

3. Defendant pleaded two pleas, requiring different modes of trial. Held, that on producing an affidavit of the falsehood of the pleas, the plaintiff was entitled to sign judgment. 2 B. & A. 777.

4. Replication *de injuria* to a plea of title in defendant in an action of trespass, cannot be supported. 7 Price, 670.

Replication *de injuria*.

5. It is not matter of conclusion to the country that the proceedings which have been had are not conformable to, or authorized by the usage and practice of the court, for evidence of such usage is not admissible on that issue. 4 Price, 11.

Conclusion to the country.

6. Where a defendant, under terms of pleading issuably, &c. demurs specially to such a replication, because it traverses all the matters of the plea, whereas it should have traversed only one, upon which a proper issue might have been joined; if the plaintiff treat that demurrer as a nullity, and sign judgment, and execute a writ of inquiry, the court will set all the proceedings aside with costs, because the demurrer is fair and *bond fide*, and the defendant is not precluded by the terms of pleading issuably. 7 Price, 670.

Issuable plea.

## POOR.

1. Where a rate was imposed upon *P.* owner of the lead-ore in certain lead-mines, in respect of the duty lead reserved in a lease of said mines, being one-fifth share of the lead to be smelted from the ore raised from said mines: Held, that this reservation was in the nature of a rent, and therefore not rateable. 5 M. & S. 139.

Of property liable to be rated.

2. The lessee of market tolls in gross not incident to the soil, is not rateable to the poor in respect of his occupancy thereof. 5 M. & S. 221.

3. Where a statute empowered the proprietors of a canal to take rates in respect of vessels navigating the same and expressly exempted such rates from the payment of all taxes, rates, &c.; it was holden that the land occupied by the canal, was also thereby exempted from poor's rate. 1 B. & A. 263.

4. Where a canal was made under the 8 G. 3. which contained no clause as to the mode of charging it to the parochial rates; and another canal was made under the 23 G. 3. c. 92., and was therein directed to be rated in a special manner, and these two canals were incorporated by the 24 G. 3., by which it was provided that all the clauses, powers, provisions, restrictions, exemptions, &c. contained in each of the two former acts should still remain distinct from each other; and afterwards by 58 G. 3. c. 19., reciting that it was expedient to extend one system of management to the whole canal, it was enacted, "That all the canals, &c. &c. so made as aforesaid, under the former acts, or any of them, should be deemed part parcel and member of the *Birmingham* canal navigations, and be considered and governed by all the clauses &c. in the 23 and 24 G. 3. (save and except so much thereof, as related to exemptions from stamp duties, or the *quantum* of tolls to be collected) as if the same had been described in the 23 G. 3. as part of the works to be made and done under and by

by virtue of that act:" It was held, that this provision only incorporated these canals, &c. for the purpose of management, and that it did not authorize the canal originally made under the 8 G. 3. to be rated to the parochial taxes in the special manner pointed out by the 28 G. 3. 2 B. & A. 570.

Of the place in which the property is liable to be rated.

5. The owners of a coasting vessel are liable to be rated in respect of the profits accruing therefrom in that parish, where they themselves reside, and where the ship is registered, and where her cargoes are usually received and delivered, and her freight paid, and which is the home of the vessel when unemployed, although at the time of making the rate, the ship was not actually within the parish, but they are not liable to be rated for a ship which was never locally within the parish, although the profits be there received by the owners. 1 B. & A. 109.

Relative to the rate.

6. A canal act directed that the company should be rated for all lands and buildings in the same proportion as other lands and buildings lying near the same, and as the same would be rateable if they were the property of individuals in their natural capacity, and a subsequent act directed that all rates and assessments upon the personal estate of the company should be assessed in every parish, in proportion to the length of the canal in such parish. Held, that the company were liable to be rated for their lands, &c. only at the same value as other adjacent lands, and not according to the improved value derived from the land, being used for the purpose of the canal. 1 B. & A. 289.

7. Where a parish contained within itself a borough not co-extensive with it, and the mayor of the borough, on a return to a *mandamus* for allowing a poor-rate made by the churchwardens and overseers of the whole parish, stated a custom which had existed since the 43 E. 2. of appointing separate churchwardens and overseers, and of making separate rates for the borough, and for those parts of the parish which lay without the borough: it was holden, that such custom was invalid, and the return was quashed accordingly. 1 B. & A. 524.

8. By a local act the management of the poor of a town was vested in certain persons who were empowered to make rates and an appeal was given to the party aggrieved, to the town sessions against every such rate; and a further appeal, if required, to the county sessions. An appeal against four rates being entered at the January town-sessions, four grounds of appeal were specified in the notice; the party being dissatisfied, made a further appeal to the county sessions, and two other grounds of appeal were added; the fourth being, that the party was rated in respect of his lands, in a higher proportion than all the other inhabitants mentioned in the rate. Held, first, that one appeal against the four rates was sufficient; secondly, that it was not necessary to give notice of appeal to all the inhabitants named in the rate; and, thirdly, that the appellant must, at the county sessions, be confined to the original grounds of appeal at the town sessions. 1 B. & A. 640.

9. The expences of a constable in prosecuting an assault, committed on him in the execution of his duty cannot be paid by the overseer out of the poor's rate, and are not within the 18 G. 3. c. 19. s. 4. Held also; that where the appeal is against the overseer's accounts, by individuals paying rates within the parish, the *certiorari* is not taken away by 50 G. 3. c. 49.: that act only applying to appeals by the overseers against the disallowance of any items in their accounts by the magistrates. 2 B. & A. 522.

10. Where

10. Where a river navigation extended through several parishes, and certain tonnage dues became payable in respect of goods carried along the line of navigation, and landed at a wharf locally situate within the parish of *B.* Held, that a rate on the proprietor of those dues for their whole amount in the parish of *B.* stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within the parish of *B.*, but as a rate upon the parts of the river situate as well within as without the parish, and that it could not, therefore, be supported. Held also, that the 41 G. 3. c. 23. s. 1. does not give the court of K. B. the power of amending a poor rate. 3 B. & A. 112.

11. An order of removal made upon a complaint, that *M. S.* the wife of *W. S.* who is absent from her, is come to inhabit, &c. and is now with child, which is likely to be born a bastard, adjudging the said *M. S.* to be actually chargeable: was held sufficient in form, although the complaint did not state that the pauper was actually chargeable. 5 M. & S. 299.

Relative to the  
removal of.

12. The pauper being a settled inhabitant of *A.* subsequently acquired a settlement in the township of *B.*: the latter township afterwards ceased to exist, as a place capable of maintaining its own poor. Held, notwithstanding, that the previous settlement in *A.* having been extinguished, the pauper could not be removed thither from a third town as to the place of his last legal settlement. 2 B. & A. 162. *Quære*, whether in such a case a removal to the parish, of which the township of *B.* formed a part, would not be good. *Ibid.*

13. A child eight years old, born in *England*, but both whose parents were *Irish*, and without any settlement in *England*, and whose mother, after the death of her first husband, had married a settled inhabitant of the parish of *A.*, is removeable if chargeable to the place of his birth, and is not within the 59 G. 3. c. 12. s. 33. 3 B. & A. 410.

14. The power given to magistrates under 35 G. 3. c. 101. s. 2. of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz. the death or removal of the pauper: and therefore, where a pauper, during the suspension of an order of removal became irremoveable, in consequence of an estate descending to him: held, that such a case was not within the act, and that the pauper not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal could be made. 4 B. & A. 235.

15. By statute 59 G. 3. c. 12. s. 33., the wife, and eight unemancipated children of a Scotchman, who has not acquired any settlement in *England*, must, if chargeable, be sent by a pass along with the husband to *Scotland*, and cannot be removed to the maiden settlement of the wife. 4 B. & A. 498.

16. Where a pauper legally settled in the parish of *A.*, having met with a severe accident in the parish of *B.*, was carried into an adjacent parish to be cured, and remained there for a long period of time: held, that he was to be considered as casual poor in the parish of *C.*, and was irremoveable; and that an order of removal to *A.*, suspended under the powers of 35 G. 3. c. 101.; and a subsequent order on the overseers of *A.*, to pay the intermediate charges incurred by the parish of *C.*, were invalid. 4 B. & A. 660.

Irremoveable  
persons.

17. The 35 G. 3. c. 101. did not repeal 33 G. 3. c. 54.; and therefore, where an unemancipated daughter was delivered of a bastard child, in the township of *J.*, during her father's residence there, under a certificate, acknowledging him to be a member of a friendly society

Certificates.

established under 33 G. 3. c. 54. Held, that such certificate extended not only to him, but to all the members of his family: also, that the daughter, therefore, was at the time of her delivery, residing in the township under the authority of 33 G. 3. c. 54., and that by s. 25. of that act, the settlement of the child followed that of the mother. 2 B. & A. 149.

18. The statutes of 8 and 9 W. 3. c. 11. and 13 and 14 C. 2. c. 12. s. 1. are in *pari materia*, and must receive a similar construction; and, therefore, where a pauper in addition to house and land, had "agisted" three cows, in the fields of his landlord, for two or three months, but no positive contract for such agistment was proved, it was held, that the sessions might properly infer that this was "taking a lease of a tenement" within the 9 and 10 W. 3. c. 11. so as to discharge a certificate, although the value of the agistment if computed only for the time of the actual occupation, was not sufficient, if added to the house and land, to make up the value of 10*l*. 3 B. & A. 171.

Appeals.

19. Where by charter, the magistrates of a borough, which was a county of itself, held only general sessions twice a year, and not quarter sessions; held, that an appeal against an order of removal, might be made to the next general sessions of the peace for such borough. 4 B. & A. 291.

20. Where an order of removal was served on the appellant parish on *Saturday*, and the sessions were holden on the following *Tuesday*, and the appellant parish was thirty-seven miles from the place where the sessions were holden, but there was no appeal to those sessions, and the justices refused to receive the appeal at the next sessions, the court granted a *mandamus*. 1 B. & A. 210.

21. The two districts of which a parish consisted, had, from the 43 Eliz. down to 13 and 14 C. 2. maintained their poor jointly: and at the time of the passing of the latter act, agreed to separate in the maintenance of their poor; and that separate overseers should be appointed, upon condition, that the rateable property in the parish, whether situated in the one or the other district, should be rated where the occupiers resided; in consequence of that agreement they had ever since uniformly maintained their own poor, separate, and had separate overseers, constables, &c. Held, that this clearly showed that the parish, at the time of the agreement, could not reap the full benefit of the statute of Eliz., and that therefore the separation of the two districts was valid, and that an appointment of overseers for the whole parish was now bad. 2 B. & A. 157. Held also, that the agreement consisted of two distinct parts, and that the invalidity of the latter part, as to rating property not situate within the district rated, did not affect the question on the former part. *Ibid*.

Overseers.

22. A select vestry for the management of the parish affairs existing by ancient custom, cannot elect another select vestry, for the management of the poor within the 59 G. 3. c. 12. 4 B. & A. 507.

23. Two divisions within a parish, had separate overseers, and separate rates, and managed their poor separately, but at the end of every year, in making up their accounts, the overseers of the one (if they had money in hand) paid the balance over to the overseers of the other. Held, that this was in effect, one joint parochial account, and that all the overseers were to be considered as joint overseers of the parish at large. Held also, that where a payment has been made by a party, at the sole request of one overseer, and without the knowledge of the others, and no demand is made upon them, till after they are out of office, it is a question proper for the jury to say, whether

whether under these special circumstances, the party ought not to be considered as having relied upon the sole responsibility of the overseer, at whose request the payment was made. 3 B. & A. 89.

24. Where a pauper residing in the parish of *A.*, received during illness, weekly allowance from the parish of *B.*, where he was settled: Held, that an apothecary, who had attended the pauper, may maintain an action for the amount of his bill, against the overseer of *B.*, who expressly promised to pay the same. 1 B. & A. 104.

### POST-HORSE ACT.

1. Where an innkeeper resides at his inn, in the district *A.*, and his stables are in the district *B.*, his residence is the criterion by which to ascertain the district, where he is to take out his licence, and to account for the post-horse duties, under 27 G. 3. c. 26. s. 13. 9 B. & A. 387. Duties under.

2. A coach and horses were hired at *Portsea*, to take a party to the theatre at *Portsmouth*, and to bring back, and a specific sum was charged. Held, that this was a letting to hire of horses by the stage, to be used in travelling, and liable to a duty of one-fourth of the amount charged under 44 G. 3. c. 98. s. 8. So where a chaise and horses were hired to take a party out to dinner, and to bring back mourning coaches, hired to take up at a distant place, and to carry thence persons to the place of interment, for which a specific sum is charged, are liable to the same duty, and such coaches are not exempted by reason of carrying a corps if living persons go along with it in the carriage. 1 B. & A. 166. Construction of.

### POWER.

1. A power of sale is reserved to three trustees, and their heirs; one of the trustees dies, and the two surviving trustees execute the power. Held, that the power was not well executed, although the deed expressly provided that the money arising from the sale, should be entrusted to the trustees for the time being; and although it also reserved a power, in case of death, &c. to appoint new trustees. 1 B. & A. 608. Of powers in general.

2. Lease by tenant for life under a deed of settlement on marriage, giving him a power to demise the lands, &c. for lives, or years determinable on lives upon certain conditions, one of which was in these words, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved: immediately after, the covenant by the lessees for payment of the rent was inserted in the following proviso, "provided always that if it shall happen, (&c.) that the said yearly rent, (duties, &c.) hereby reserved, or any part thereof, shall be behind, unpaid, or undone, in part or in all, by the space of fifteen days next, over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid; and no sufficient distress or distresses can, or may, be had and taken upon the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied, and paid, (&c.) it may and shall be lawful to and for (the tenant for life), his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises

premises shall, as aforesaid, belong, into and upon the said premises hereby demised, (&c.) wholly to re-enter, &c." Held, in an action of ejectment by the reversioner against the lessees, to be valid, on the ground that the above proviso contained in the lease for re-entry, was conformable with the power to demise contained in the deed of settlement, and satisfied the particular condition in question, on which it was to be exercised, and that the lease was therefore a good execution of the power to demise, which was held to be general, and such as authorised the lessor to annex the fair and *bond fide* exercise of a due discretion reasonable and legal qualifications to the power of re-entry for nonpayment of the rent reserved, and did not require the tenant for life to exact and absolute unqualified right to have an immediate power to re-enter on the expiration of the day on which the rent reserved should be made payable. Both of the above qualifications are legal and reasonable, and may be annexed to a power of re-entry for non-payment of rent required by an indefinite leasing power, to be contained in leases to be made under it, to temper the rigor of such a right, where the requisition in such leasing power is general in its terms, or does not expressly prohibit their introduction without being a departure from the exigency of the power. 7 Price, 281.

3. Devisee for life, with a power enabling her, in consideration of marriage, to revoke the uses limited to her, and to appoint to such uses, and with such powers and provisos, and in such manner as was by her afterwards done, by a deed of settlement, in consideration of marriage, revoked the uses, and appointed the lands to hold to the use, after the marriage, of her husband for life, *sans waste*, and after his decease, to the use of herself for life, *sans waste*, with remainder to divers other uses for the benefit of the issue of the appointer; remainder as she should by will appoint, with remainder to the use of herself in fee. The settlement contained a power for the husband and wife from time to time, when in possession of the premises so limited to them for their lives, by indenture to demise such premises as then were leased for lives, or for years determinable on lives, to any persons in possession or reversion for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be determinable on the dropping of three lives, and so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, or a just proportion of such ancient; or the then reserved rents, &c. (except heriots which might be varied at will;) and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved; and, also, by indenture to demise any of the premises for any term absolute, not exceeding twenty-one years, in possession, and not in reversion, so as they were reserved so much, or as great and beneficial, yearly and other rent and rents, and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same, without taking any fine, and so in every such lease there were contained a clause of re-entry in case the rents reserved were unpaid by the space of twenty-eight days, and also, by indenture to demise any of the premises wherein or whereupon any mine or mines should be open, or any person should be willing to open every such mine for any term not exceeding thirty-one years in possession, so as upon every such lease there were reserved such share of the produce,

duce, or yearly rent, as could reasonably be obtained without taking any fine, and so as the lessees were not, by any express clause, freed from impeachment of waste other than in the necessary and reasonable working thereof, and so as there were inserted such proper and usual covenants for the effectually winning and working the mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature. The lands in the declaration mentioned had been, and were leased, and were under and subject to a lease for a term of years determinable on lives. The husband, after the marriage, by indenture, in consideration of the former lease, and of 105*l.*, and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements therein after specified and reserved on the part of the lessees, demised the lands in question for ninety-nine years, if three or either of them should so long live, paying the yearly rent of 2*l.* by equal portions at Michaelmas and Lady Day, with a couple of fat capons, or 1*s.* 6*d.* in lieu thereof, at the election of the lessor, and, also, an heriot of the best beast, or 40*s.* in lieu thereof, upon the death of every tenant dying in possession, and the like upon every assignment, sale, forfeiture, or alienation, and also the lessees yielding and doing constant suit of mill, paying such toll and multure as others grinding their corn there should pay. The lease contained a covenant by the lessees, to pay the yearly rent of 2*l.*, and the duties, heriots, suits, services, and other reservations at the time, and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof, with a proviso that if at any time the rent of 2*l.*, and every or any of the duties, services, reservations, and payments thereby reserved, or any part, should be unpaid or undone by fifteen days next, over or after any of the times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises, or if the lessees should leave the premises in decay six months after view had, and notice given, or should commit any wilful waste, or grind their corn at any other mill (the lessor's mill being in repair) or if the lessees should assign without licence, or if any default should be by the lessees made in the payment or performance of all or any of the reservations, covenants, and agreements therein before on their parts contained, then the lessor, and the person to whom the freehold of the premises should belong, might re-enter. Upon the trial of an ejectment, evidence was received that the usual and accustomed form of leases of the estate contained in the marriage settlement for lives, or years determinable on lives, as well prior, as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in this indenture. Held, by four judges against three, that the clause of re-entry in the lease did not pursue the form required by the leasing power. Held, by three judges, that the evidence of the former leases was well received. 1 B. & B. 97.

4. If a power to demise refer to "such ancient and accustomed, or as great and beneficial rents, duties, and services as had formerly been reserved," &c., or if from its general tenor it may be collected that the creator of the power intended that the maker of the leases should have regard to the state of the property during former occupations; the form and covenants of such previous leases may be taken as a guide by the lessor in framing new leases, and the contents of the former may be received in evidence on a question, as to

whether the power were well executed affecting the validity of such new leases, to show that they were framed in the same terms as those of the old leases. 7 Price, 281.

5. Under a power to tenant for life, to lease for ninety-nine years determinable one, two, or three lives, a lease for ninety-nine years, if *E. H.* should so long live, to commence from the death of *J. S.* and *M. R.* (two lives on which a subsisting lease for years was determinable, was held ill. 5 M. & S. 40.

Powers in miscellaneous cases.

6. Where by a settlement in contemplation of marriage, the estates were given to trustees for the use of such of the children, child, and issue of the body of the settlor by his intended wife, and in such shares, &c. as he and his wife, or the survivor of them should by deed or will appoint: held, that an appointment of the whole estate to one of the children by the widow, was valid, and that the words "such shares, &c." did not import that it was necessarily to be divided, and some part appointed to each child. 2 B. & A. 122.

7. *M. P.* devised all her lands, &c. in *Westley*, in the county of *S.*, to *A.* and his issue, and in default of issue to such uses as *A.* might, by his will appoint. *A.*, by a will made in the lifetime of *M. P.*, devises all his lands in the parish of *Worthen* and elsewhere, in the county of *S.*, after several estates for life, and in tail to his own right heirs in fee, and afterwards by a codicil, made after the death of *M. P.*, revokes the devise of the reversion to his heir (in all other respects expressly confirming the will) and then devises the reversion in fee of all his said lands in the parishes of *Worthen*, *Westbury*, and *Cherbury*, in the county of *S.*, to *B.* *A.* had no other land in *Westbury* except what he took under the will of *M. P.* Held, however, that the power of appointment was not well executed by the codicil. 2 B. & A. 291.

8. *A.*, by his will, bequeathed to *R. S.* and *R. L. R.* a sum of money upon trust, and to *M. S. R. S.* and *G. A. D.* certain personal property upon trust; and then devised his real property to *R. S.* and *G. A. D.*, also upon trust, and then directed that if either of his said trustees, the said *R. S.* and *R. L. R.* so far as applied to the trusts reposed in them respectively, or the said *M. S. R. S.* and *G. A. D.* so far as applied to the trusts reposed in them respectively, as aforesaid, should decline to act, &c. it should be lawful for the survivor of the trustees so acting in the trusts wherein such vacancy should happen, or the executors or administrators of the last surviving trustees, to appoint other trustees. Held, first that this power only extended to the two first classes of trustees, and not to the trustees of the real estate. Held, secondly, that it was not well executed by the two trustees, both of whom had wholly declined to act in the trust. 2 B. & A. 405.

## PRACTICE.

Declaration.

1. A writ was served at eight o'clock in the evening of the day on which it was returnable; and notice, dated the same day, of a declaration being filed conditionally on that day, was given on the following morning. Held, that there was no irregularity. 3 Taunt. 127.

2. A defendant settling a matter in dispute with the plaintiff, in the absence of the plaintiff's solicitor, after having been served with process

process in the following manner (not admitting any thing to be due on account of the action) by introducing a memorandum into a receipt given by the plaintiff to defendant on another account, that no further proceedings were to be had in the action, does not bind the plaintiff's attorney: but in the present case, the plaintiff's attorney, on showing cause against the motion made for refunding the costs which had been levied by execution, swore, that defendant admitted knowledge of notice of declaration before signing interlocutory judgment, and the defendant had told him that he had paid plaintiff the debt, but did not show him the memorandum; that he then informed the defendant, that, unless the costs were paid, he should proceed in the action, and that he had, therefore, on executing the writ of inquiry, taken nominal damages only. 6 Price, 15.

3. Service of notice of declaration to found an interlocutory judgment, and authorize a writ of inquiry, is good, by affixing it on the door of the dwelling-house where defendant last lived, if the plaintiff or his attorney do not know the place of his removal, and knowledge can be brought home to him; and in case of irregular service, the defendant should move the court before the execution of the writ of inquiry. 6 Price, 15.

4. Defendant not entitled to an imparlance where he has by his own act prevented plaintiff from declaring within the term. 2 B. & A. 390. Imparlance.

5. A declaration was delivered on the assign day of Hilary Term, and an imparlance to Easter Term was obtained by the defendant. In that term a rule to plead was given, but no demand of plea was made; the Plaintiff having in Trinity Term signed judgment as for want of a plea. Held, that the judgment was irregularly signed, that all the proceedings thereon must be set aside, and all further proceedings be stayed. 8 Taunt. 83. Plea.

6. After delivery of an amended declaration a demand of a plea is not necessary to entitle a party to sign judgment. 3 B. & A. 137.

7. A plea of *com perit ad diem* on debt on bail bond must be delivered. 2 B. & A. 392.

8. A general plea of bankruptcy must be delivered, and not filed. 2 B. & A. 392.

9. Where a plaintiff, after being told it was not usual to obtain the *posted*, or to tax costs, till the evening of the fourth day of term, obtained the *posted* before four o'clock on that day, under a promise not to tax costs, and on pretence of wishing to effect the stamping; but, instead of doing that, signed judgment, and issued execution, the court set aside the judgment and execution, allowing the defendant all his costs occasioned by such proceeding. The court notified, that for the future, the *posted* shall not be delivered till the morning of the fifth day of term. 1 B. & B. 298. Postea.

10. The court will not allow more than two motions to be made successively by the same counsel till they have gone through the rest of the bar. 4 Price, 346. Motions.

11. Matters of fact not appearing on the record cannot be called in aid in opposition to a motion in arrest of judgment on objections apparent on the face of the record. 5 Price, 447.

## PRINCIPAL AND AGENT.

1. Where a return cargo belonging to the plaintiff had been consigned by the defendant to B. and W., to be held at the orders of de- Relation of.  
3 D 4

defendant, who had a lien on it, and such cargo had been sold by *B.* and *W.* and the lien satisfied; held, that the plaintiff could not consider *B.* and *W.* as defendant's agents, so as to entitle him to maintain money had and received against the defendant for the balance remaining in the hands of *B.* and *W.* 4 B. & A. 594.

Rights of agent  
against principal.

2. *A.* a foreign merchant employs *B.* to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of *A.*) make out the invoices to *B.*, and take in payment his acceptances payable at six months. Held, first, that there was no contract of sale as between *A.* and *B.*, and, secondly, if any such contract existed, that *B.* could maintain no action against *A.* before six months expired. 1 B. & A. 14.

3. An agent cannot dispute the title of his principal, and therefore where a ship originally belonged to one of two partners and had been conveyed to *B.* for securing a debt, and *B.* became the sole registered owner of the ship, and afterwards as agent for both partners insured the ship and freight, and charged them with the premiums, &c., and on a loss happening received the money from the underwriters. Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner to whom the ship originally belonged. 2 B. & A. 310.

Agent's liabilities  
towards  
principal.

4. *A.* having a commission from *B.* to ship tobacco, employed *C.* as his broker, and directed him to buy *Porto Rico* tobacco of the best quality. *C.* bought tobacco and shipped it to *B.*, and delivered his bought note to *A.*, in which the tobacco was described as *Porto Rico* tobacco only. *B.* finding the tobacco to be very bad, refused to accept it, and brought an action against *A.* and recovered. Held, that an action lay by *A.* against *C.*, and that *A.*'s acceptance of the bought note was not a waiver of his directions as to quality, and that the proper measure of damages was not the mere difference between the two kinds of tobacco, but the amount of the damages and costs recovered in the action by *B.* against *A.* 8 Taunt. 202.

Liability of  
principal for his  
agent's act or  
contract.

5. A factor has an authority to sell for money, but not to barter; and therefore where a factor bartered the goods of his principal no property passed, and the principal may maintain trover against the party with whom the goods are bargained, although the latter be wholly ignorant that he had been dealing with a factor only. 3 B. & A. 616.

6. The character of broker is materially different from that of factor, and therefore where a broker sells goods without disclosing the name of his principal; held, that he acts beyond the scope of his authority, and that the buyer cannot set off a debt due from the broker to him against the demand for the goods made by the principal. 2 B. & A. 137.

Liabilities of  
agent towards  
third persons.

7. The solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking, "We as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained." Held, they were personally liable. 3 B. & A. 47.

## PRISONER.

Commitment  
of.

1. *A.* defendant may be committed to the custody of the marshal upon a special original. 3 B. & A. 601.

2. The

2. The court will not change the custody of a prisoner where the crown is concerned, without the express consent of its officers. *Proceedings against.* 8 Taunt. 148.

## PROCESS.

1. *Testatum capias*, directed to the coroner, where one of the two sheriffs of Bristol was party to the suit, held irregular, for it ought to have gone to the other. 5 M. & S. 144. *In general.*

2. If a *capias ad respondendum* be directed to the chamberlain of the county Palatine of Chester, commanding him to take the defendant, it is irregular, and the defendant may take advantage of such irregularity. 1 B. & B. 12.

3. An arrest of a party described in a *testatum*, special *capias*, and in the affidavit to hold to bail by initials of his christian name, only is irregular. 4 B. & A. 536. *Mesne.*

4. An arrest in the City of London, on a bill of Middlesex, is irregular, even though it took place on the verge of the county of Middlesex, if there be no dispute as to the boundaries. 3 B. & A. 408.

5. The court refused a *distringas*, on affidavit, stating that it was believed that the defendant kept out of the way to avoid process, that the officer having applied thrice at the defendant's house, was told each time by the servants that their master was not at home, that they did not know where he was, that he had been absent for months, and that he had not been at home since the officer called last. 8 Taunt. 171.

6. The Court granted a *distringas* on affidavits, stating that it was believed that the defendant absconded to avoid process, that repeated applications have been made at his house, and no satisfactory answer had ever been given to the enquiry as to the time of his coming home; and that on learning that the business of the applicant was to serve the defendant with process, the persons at the house treated him with derision. 8 Taunt. 57.

7. A sheriff's officer, in execution of mesne process, peaceably obtained entrance by the outer door of the house, and followed the defendant to his bed-room, who locked himself therein, and refused to open the door, though informed by the officer of his business. The officer then waited in the garden, at the back of the house, all night, and in the morning, touched the defendant through a broken pane of glass, requiring him to surrender, and then entered the room in which the defendant was, through the window, which the officer on entering, farther broke, and arrested the defendant. Held, that the officer was justified. 8 Taunt. 250.

8. A notice, by mistake, to a defendant to appear on a day which has passed, is an irregularity, for which the court will set aside the proceedings. *Baratta v. Lee*, 8 Taunt. 253.

9. The defendants having signed a regular bail-bond, were held to have waived the irregularity of the omission of their christian names in a *capias ad respondendum*, directing the sheriff to take Messrs. L. and B. 1 B. & B. 529.

10. It is no objection to the notice at the foot of a bill of Middlesex, that it wholly omit to state the year, or word next. 2 B. & A. 642.

11. In the execution of criminal process against any man in the *Criminal case*

case of a misdemeanor, it is necessary to gain admittance before the breaking of the outer door of the house can be legally justified. *Quære*, if so in the case of felony? 2 B. & A. 592.

### PROPERTY TAX ACT.

#### Construction.

A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may at the same time have a more permanent residence elsewhere. An exemption of persons coming to reside "for some temporary purpose only, and not with any view, or intent, of establishing a residence therein, and who shall not have actually resided in *Great Britain* for the period of six successive calendar months," does not include a person taking a house in *London*, and furnishing, and residing in it for a less period than six months at any one time, and who then goes elsewhere with his establishment, and resides for the remainder of the year there, leaving behind him some one merely to take care of the house. Such a person is, therefore, within the act of the 46th Geo. 3. ch. 65., but not within the exemption of the 51st section. 4 Price, 183.

### QUO WARRANTO.

#### When it lies or not.

1. It is in the discretion of the court to grant a *quo warranto* information or not; and under circumstances tending to throw suspicion on the motives of the relator, the court will not grant such application where the consequences will be to dissolve a corporation. 2 B. & A. 479.

#### Parties to.

2. It is a valid objection to a relator applying for a *quo warranto* information, that he was present and concurred at the time of the objectionable election, even although he was then ignorant of the objection, for a corporator must be taken to be cognizant of the contents of his own charter, and of the law arising therefrom. The court will not make such a rule absolute, where a relator appeared to be a man in low and indigent circumstances, and there were strong grounds of suspicion that he was applying not on his own account, or at his own expense, but in collusion with a stranger. 2 B. & A. 339.

#### Pleadings in.

3. In *quo warranto*, for exercising the office of mayor, upon issue joined, that *H.* the presiding officer at defendant's election, was not then mayor, the title of *H.* to be mayor, and not merely whether he was mayor *de facto*, is put in issue; and evidence was held admissible to show that *H.* had not been lawfully elected, *H.* being then dead; but, before his death, an information having been filed against for usurping the office. *Semble*, that it is not competent, on the trial of an information of *quo warranto* against the elected, to impeach by evidence the titles of the electors, unless they are specially questioned on the record. 5 M. & S. 271.

### RECORD.

#### What is or is not.

1. A recognizance is not a record until it is enrolled, and therefore where defendant pleaded to assumpsit on bills of exchange, &c. that the

the plaintiff was indebted to him, by virtue of a recognizance taken in the Court of Exchequer, which was still in force, as by the said recognizance remaining in the said court before the Barons will appear, without stating that it was enrolled; a replication, that the plaintiff was not so indebted, concluding to the contrary, was held good, on special demurrer, inasmuch as the plea did not state a debt due by recognizance which was matter of record. 1 B. & A. 153.

2. An averment that the defendant had voluntarily permitted his bill to be discontinued for want of prosecution thereof, with a conclusion to the record, is not proved by showing that there had been actually a rule to discontinue regularly taken out: the record having been averred, it must be proved. Had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue, and evidence of the payment of costs. 5 Price, 540. Pleadings.

### REMAINDER.

1. A testator having an estate, which had been conveyed by the settlement on his first marriage to trustees, to the use of himself for life, remainder to his first and other sons successively in tail male, and having one son and two daughters by his first marriage; shortly after his second marriage, made his will, and devised to his son all his manors, &c. the personal property, subject to the payment of the debts and legacies; but in case his son should depart this life without issue male, or in case of failure of issue male of the testator's body, he bequeathed to all and every his daughter's who should be living at the time of his death, or born in due time afterwards, 40,000*l.* equally to be divided amongst them, in addition to what they might be entitled to under the marriage settlements of their respective mothers; and if only one daughter, then he bequeathed 20,000*l.* to her; he then charged his estates with the payment of these sums, and devised them to *A.* and *B.* their heirs, &c. without impeachment of waste upon trust, by sale or mortgage, to raise a sufficient sum to pay those legacies, with interest, and then he devised the remainder of his manors, lands, &c. as should not be sold by the trustees for that purpose, for want, or in failure of issue male of his body, as aforesaid, unto his brother for life, with different remainders over. The testator had no children by the second marriage, and his only son by the first marriage having died under age, unmarried, and without issue; held, that the surviving daughters took no estate by descent in the hereditaments devised by the will; and, secondly, that if the devise to *A.* and *B.* had been of a power to raise money, by sale, and not of a legal estate, that the testator's brother would have taken an estate for life with remainders over; and, thirdly, that under the will *A.* and *B.* took an estate in fee. 3 B. & A. 654. Contingent.

2. A settlement made on the marriage of *H. W.* with *A. D.* (after giving the husband and wife respectively, estates for life, with a power of appointing by deed or will jointly, during the coverture; and in default of such appointment, separately, after the death of either,) contained the following limitation in default of any such appointment: "To the use of all and every the child and children of the marriage, both sons and daughters, equally part and share alike; if more than one, as tenants in common, and not as joint tenants; and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and in case there shall be more children than Cross remainder.

than one of the said intended marriage, and any such child or children shall happen to die under the age of twenty-one years, without issue of his or their body or bodies lawfully issuing, then so often as the part and share, parts and shares, of all and every such child and children to the use of the surviving children, part and share alike, if more than one, as tenants in common, and not as joint tenants; and to the heirs of the body of every such child and children, until every such child and children should be dead; and in case there should be but one child only of the marriage, or one only surviving child, then to the use of such surviving child in tail; and for default of issue of the marriage, and in case there should be issue, who should all die without issue, under the age of twenty-one years, then to the heirs and assigns of the survivor of *H. W. & A. D.* in fee." The marriage between *H. W. & A. D.* having taken place, *H. W.* died *intestate*, leaving his widow and two children, Joseph and Ann. The widow made her will, devising the property over, only in case of the death of both children without issue, before twenty-one, and died, leaving the two children, Joseph and Ann, who both attained the age of twenty-one years. *Ann* married *T. Weatherall*; *Joseph* died shortly after having made his will, by which he gave all his real estates in the county of *K.* or elsewhere, to his sister *Ann*, the wife of *T. Weatherall*, in fee. Held, that *Ann*, who was already tenant in tail of one moiety of the lands comprized in the marriage settlement, became, as the heirs at law of *J. W.* tenant in fee of the other moiety. 1 B. & B. 401.

### REMEDIAL STATUTE.

Construction of.

A creditor may, with the assent of the debtor, take possession of the goods of his debtor, and remove them from the premises, for the purpose of satisfying a *bona fide* debt, without incurring the penalty of stat. 11 G. 2. c. 19. s. 3. against persons assisting the tenant in removing his goods from the premises; although the creditor takes possession, knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain. 5 M. & S. 200.

### REPLEVIN.

Pleadings.

1. An allegation of payment of land tax, and paving rates, due for any period preceding the current year, is no plea in bar to an avowry for rent arrear. If the land tax and paving rates are not deducted, (as they ought to be,) from the rent of the current year, they cannot be deducted, or the amount of them be recovered back from the landlord, in any subsequent year. 1 B. & B. 37.

Practice.

2. A plea in bar in replevin stated that divers sums of money, amounting to a certain sum, had been from time to time duly assessed and rated upon the premises for land tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax, which defendant, as landlord, was liable to bear, in respect of the rent: held, that this plea was bad, for not stating the specific periods for which the respective sums were assessed or paid, and in not stating that the payment was made after the rent distrained for had accrued, or was accruing. 3 B. & A. 516.

3. Where

3. Where an avowry stated that the defendant held the premises at a certain yearly rent, to wit, the yearly rent of 72*l.* and the plaintiff pleaded first, *non tenuit*, secondly, *riens* in arrear, and the first plea was found for the plaintiff; held, that the second plea became thereby immaterial, and that the proper course was to discharge the jury from finding any verdict upon it, but that if any verdict was entered upon it, it must be entered for the plaintiff. 2 B. & A. 546. Practice.

4. The avowant in replevin on a distress for poor rates, is only entitled to single cost, under 43 Eliz. c. 2. s. 19. 1 B. & B. 517. Costs.

5. The statute 11 G. 2. c. 19. s. 22. gives double costs against a plaintiff in replevin only in three cases, viz. where he is nonsuit, discontinues his action, or has judgment given against him, and therefore where in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favor of defendant; it was held, that he is not entitled to double costs under the statute. 1 B. & A. 670.

### REVERSIONER.

Covenant will lie by the assignee, of the reversion of part of the demised premises, against the lessee, for not repairing. 2 B. & A. 105. Rights of.

### RIGHT, WRIT OF.

Where the sheriff returned to a writ of summons on a writ of right, that he had summoned four knights, which was according to fact, but the officer of the court, in expectation that the knights were about to be sworn, had, before the return, written on the lower part of the same instrument, that they were duly sworn, which was not true, in an action, on the case against the sheriff for a false return, and for negligence, in not causing the knights to be sworn, held, that the indorsement by the officer was no part of the return; that the sheriff was not answerable for the contents of such indorsement, and that the return was not false. Also, that the sheriff, being only commanded by the writ, to summon the knights, was not guilty of negligence in omitting to have them sworn. 1 B. & B. 17. Summons.

### RIVER.

1. A prescriptive right to a public towing path, on the banks of a navigable tide river is not destroyed, in consequence of that part of the river adjoining the towing path, having been converted by act of parliament into a floating harbour, although the towing path was thereby subject to be used at all times of the tide; whereas, before it was only used at those times when the tide was sufficiently high, for the purposes of navigation: held, secondly, that the prescription was not destroyed by a clause in the act of parliament, whereby the undertakers of the work were authorized to make a towing path over land, comprising the towing path in question, on paying a compensation to the owner of the soil, the effect of that being only to give him a compensation for Banks of.

for any injury he may sustain, by enlarging the then towing path, or otherwise. 3 B. & A. 193.

Rights connect-  
ed with.

2. In a public navigable river, twenty years' possession of the water, at a given level, &c. is not conclusive as to the right. 2 B. & A. 662.

### SCIRE FACIAS.

To revise a  
judgment.

1. The court permitted the defendant to set aside, for irregularity, a judgment on a *scire facias*, where the writ being issued more than ten years after the original judgment was drawn up out of term, and issued on a serjeant's signature, instead of being issued upon motion in court, and where the defendant had no personal notice of the proceeding. 1 B. & B. 381.

Amendment.

2. Where a *scire facias*, founded on an inquisition mis-recites the inquisition, and therefore fixes by such recital, a day on which the debt had been found to be due, differing from the true day named, as in the inquisition, the court will give leave (on cause being shown) to amend the writ, on payment of the costs, &c. even after the defendants have pleaded. 4 Price, 181.

### SESSIONS.

Jurisdiction of.

1. The sessions have no jurisdiction under 55 G. 3. c. 51. s. 16. to make a prospective order for a compensation thereafter to be made to the clerk of the peace; and therefore, where a county treasurer, in obedience to such an order, made the payment, and that payment was afterwards, by an order of sessions, allowed in his accounts, the court of K. B. quashed so much of the order of sessions, as allowed that item. *Quære*, Whether, under the 55 G. 3. c. 51. s. 16. the sessions have a power to make any compensation to the clerk of the peace? 3 B. & A. 215.

2. The 15 G. 2. c. 24. is a declaratory act, and should have a liberal construction; and therefore, where justice of a borough, contributory to the county rate, have committed prisoners to the county house of correction, for offences cognizable within the county, the justices at their borough sessions have a right to order such prisoners to be brought before them for trial there. *Quære*, also where a county magistrate having concurrent jurisdiction, has committed a prisoner for an offence within the borough sessions, have not the same power of ordering such prisoner to be brought before them for trial. 2 B. & A. 533.

3. The justices of the borough of *Liverpool* have no authority to commit to the house of correction, for the county of *Lancaster*, a person convicted by them under the 51 G. 3. c. 143. (local and personal) of being a rogue and vagabond, within the meaning of the 17 G. 3. c. 5. 5 M. & S. 311.

4. The justices of the borough of *Liverpool*, have authority to sentence, and to commit, in execution of such sentence, to the house of correction for the county of *Lancaster*, an offender convicted before them, at the borough sessions, of petit larceny. 5 M. & S. 300.

Judgment of.

5. The Court of K. B. has no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration,

ation, and therefore, where the sessions having heard the witnesses on one side, had refused to hear those on the other side, in an appeal on the ground, that their testimony had been prefaced, by observations on the part of the advocate, contrary to the usual practice, the court refused to grant a *writ* to re-hear the appeal. 4 B. & A. 86.

### SET OFF.

1. *B.* cannot, in an action brought against him by *A.*, set off a judgment recovered by him against *A.*, for which *A.* is charged in execution. 5 M. & S. 103. When allowable.
2. In covenant upon *non est factum*, with a notice of set-off, the defendant cannot go into evidence upon the set-off. 5 M. & S. 164. On the plea and notice of set-off.

### SETTLEMENT OF THE POOR.

1. To make a valid contract of hiring and service, it is not absolutely necessary that the contract, when by deed, should be executed by the master; it is sufficient that he accepted the services on the terms of the deed, and therefore, where a pauper executed a deed, by which he became bound to serve the master for a year, and afterwards entered into, and continued in his service for that period, it was held, that such deed, although not executed by the master, ought to have been received in evidence, to show the terms of the hiring. 2 B. & A. 375. Of settlement by hiring and service.
2. A pauper was hired for a year, from old Michaelmas, to go away a month at harvest, and to make up the time after Michaelmas: held, that this was not a hiring for a year, and no settlement was thereby gained. 2 B. & A. 520.
3. A pauper having hired himself without specifying any time, entered into the service before New Year's day, and quitted two days after Christmas, receiving his full wages, that being the usual time that servants in that part of the country go into, and leave their places. The Court thought that this was a contract, which had arrived at its termination before the expiration of a year, but the sessions having expressly found it to be a hiring, and service for a year, the Court considered themselves as bound by that finding. 4 B. & A. 624.
4. A pauper, in consideration of weekly wages, agreed to serve T. S. a bricklayer, for three years, but in case he should neglect his master's business, or lose any time on his own account, in any one week during the first year, then that T. S. should deduct from his weekly wages in proportion, and T. S. agreed that he would pay wages in proportion to any over work, which the pauper might do in any one week. There were similar stipulations for the second and third years of the term, and it was also agreed, that in case they could not work through severity of weather in any one year in the winter time, then that T. S. should pay no wages during that time, but should permit the pauper to employ himself in any other business whatsoever: held, that these were express exceptions in the contract, and that the pauper by serving a year under it did not gain a settlement. 3 B. & A. 107.
5. Where a pauper being hired for a year, and being served till within

within a few days of the end of the year, went without his master's leave, to the statutes to hire himself for the next year, and on the master dismissing him for that, went before a magistrate with his master, and there offered to serve his year out, but upon receiving his full year's wages was satisfied, and did not return to his service, but neither hired nor offered to hire himself into any fresh service till the year had expired. Held, that this amounted only to a dispensation with his service, for the remainder of the year, and that he thereby gained a settlement. 2 B. & A. 483.

6. In settlement by hiring and service, the pauper is settled where his place of rest is, and therefore, where a servant who drove the mail cart, had a bed provided for him by the year at *N.* where he rested every night during four or five hours in the middle of the night, and afterwards returned back in the morning, to his master's house at *M.*, and usually went to bed in his own exclusive room for about two hours. Held, that this place of rest was in *M.*, and that his settlement was there also. 3 B. & A. 374.

7. A hiring at weekly wages either to be at liberty to part at a month's notice, was held to be a yearly hiring, although the case stated, that the pauper let himself by the week, it being also stated, that at the time, pauper let himself by the week, nothing passed between him and his master as to his being hired by the week, except that he was to have weekly wages. 5 M. & S. 114.

8. Where pauper, at the time of hiring himself, had a daughter of the age of eighteen, who from the age of four, had lived with her grandfather, and had been maintained by him until his death, and afterwards by her grandmother, which continued until she attained twenty-one, the grandfather having by his will, directed the grandmother to educate and maintain her out of a fund given to the grandmother for life, and after her decease, to the daughter: held, that the daughter was not emancipated, and consequently pauper was not within stat. 3 & 4 *W. & M.* a person not having a child at the time of the hiring. 5 M. & S. 214.

9. Where a female natural child was hired for a year by the wife of its reputed father, and continued doing the household work for three years, but after the first year no wages were paid, nor was there any contract of hiring: held, that the sessions were warranted in finding, that after that time she did not continue on the terms of the original hiring. 1 B. & A. 178.

10. Where by a parol contract the master agreed to teach the pauper to make stockings during the year, for which he was to receive two guineas, and the pauper was to have his earnings, paying his master for the use of the frame, &c., and the pauper continued in the service a year and a half; it was holden that the pauper did not gain a settlement by hiring and service. 1 B. & A. 115.

11. A pauper, before the expiration of her apprenticeship, hired herself and served for a year, the four months of which were after her indentures had expired, and then hired herself to the same person for another year, but served only ten months: held, that the first service, although without the knowledge or consent of the master, might be coupled with the service under the last contract, and that the pauper thereby gained a settlement. 1 B. & A. 280.

12. A service under a hiring for fifty-one weeks, may be coupled with a service under a previous hiring for a year, so as to confer a settlement. 1 B. & A. 319.

13. A

13. A clerk in a mercantile house hired by the year, but serving only during the usual hours of business, thereby gains a settlement, although those hours did not by the custom of the trade ever occupy the whole, and he went where he pleased without asking his master's leave, when those hours were over. 1 B. & A. 322.

14. A pauper agreed to serve as a bricklayer from Michaelmas to Michaelmas, and to make 70,000 bricks at a stipulated price. Held, that this was not a contract for a years' service absolutely, but a contract to serve till the completion of the job, and therefore a settlement was not thereby gained. 1 B. & A. 325.

15. A father has at the common law no authority to bind his infant son apprentice without his assent, and consequently, where an indenture of apprenticeship was executed by the master and the father of the apprentice, but not also by the apprentice himself: held, that it was invalid and that no settlement could be gained under it. 3 B. & A. 584. Of settlement by apprenticeship.

16. The statute 51 G. 3. c. 80. extends to parishes, where there are three officers, only one of whom acts as churchwarden as well as overseer, and therefore an indenture in such a case signed by two parish-officers, one of whom acted in a double capacity, was held to be valid. 2 B. & A. 200.

17. Where a master mariner having no immediate occasion for his apprentice's service, the vessel being then in dock, offered either to turn him over to another master, for a time, or to let him go back to school, and the apprentice said he would go back to school and learn navigation; and accordingly did so, and resided above forty days there: held, that such residence was not a residence under the indentures, and that he did not thereby gain a settlement. 2 B. & A. 382.

18. By an indenture of apprenticeship, it was stipulated that the master should provide meat, &c. during the term, except in the winter seasons, when the ship to which the apprentice belonged should be laid by unrigged, during which time the apprentice was to be maintained by himself or friends, the master paying a compensation. Upon this stipulation the apprentice during the winter resided with his parents in the township of B., for more than forty days, not doing any work for his master during such residence. Held, that this was not a residence under the indenture, and conferred no settlement. 4 B. & A. 84.

19. A parish apprentice and his master being both on the permanent staff of the local militia, in consequence of that circumstance, resided together with his master, and continued to serve him in the parish of B. for forty days. It was held, that this residence was sufficient, and that he thereby acquired a settlement in B., notwithstanding they were both under the control of their superior officers during the whole time. 3 B. & A. 411.

20. Where the mother of an apprentice, whose time had not expired, applied to his master to give him up to her, and the master having consented to it, and all having agreed to part, the apprentice went away, but the indenture, which was in the hands of a third person, was never applied for, nor given up. Held, that the apprenticeship was not put an end to by this agreement, although the master said that he would have given up the indenture if he had had it in his possession at the time, and afterwards refused to take back the apprentice. 3 B. & A. 362.

21. An infant may bind himself apprentice, by indenture because it is

is for his benefit; and though he be a pauper in the parish work-house at the time of the binding, and the parish officers pay the premium, yet it is not necessary that they should sign the indenture, or that the justices should assent thereto, if the apprentice be not a parish apprentice within the meaning of the statute 43 Eliz. c. 2 5 M. & S. 257.

22. The master of several apprentices, upon his quitting business, proposed to assign all his apprentices, without mentioning either their names or number, to *J. S.*, but no assignment was ever made; the pauper, one of the apprentices, was afterwards hired by *J. S.* as a servant, for fifty-one weeks, and her former master on meeting her expressed his approbation of her having gone into the service of *J. S.*; the sessions having found that there was not a particular assent of the original master to the second service, and therefore the relation of master and apprentice never subsisted between *J. S.* and the pauper, this court thought the sessions well warranted in that conclusion. 1 B. & A. 116.

23. An indenture stated that the overseers and churchwardens of *M.*, in the county of *Warwick*, with the consent of justices of the said county, bound a pauper apprentice to *T. W. of H.* in the county of *Leicester*, and the justices in their written consent on the margin, described themselves as justices of the county aforesaid. Held, that it sufficiently appeared that they were justices of the county of *Warwick*. 1 B. & A. 273.

24. The statute 43 Eliz. c. 2. does not require absolutely two churchwardens in every parish for the management of the poor, and therefore an indenture binding out a poor apprentice by one churchwarden, where by custom there was but one, and one overseer, was held to be good within the fifth section of that statute, which requires it to be executed by the greater part of the churchwardens and overseers. 1 B. & A. 275.

Of settlement  
upon a tene-  
ment of 10*l.* a  
year value.

25. A pauper does not gain a settlement by having hired a tenement of more than 10*l.* a year value, and having resided therein more than forty days altogether, but less than forty days before the passing of the 59 G. 3. c. 50., by which a residence for twelve months is necessary, in order to confer a settlement. 4 B. & A. 681.

26. Where pauper by order of a corporation made at a common-hall, was allowed the liberty to take sand and gravel from the bed of a river (of which the corporation were entitled to the soil) with a condition that he sold the sand to the inhabitants of the town, at a certain rate, for which liberty he paid to the corporation at the rate of 10*l.* per annum. Held, that he thereby acquired a settlement. 5 M. & S. 90.

27. Where pauper, a married man, agreed to serve *S.* for a year, as a labourer, and was to have 20*l.* a year, a house and garden, a piece of land for potatoes, the milk of a cow, and feeding of pig, which were to run on a neighbouring field, and under this agreement, the pauper served, and had the exclusive occupation of the house for himself and family, the house being about 100 yards from the house of *S.*, and being necessary for the performance of his service, and if he had not had it, he would have had more wages. Held, that this was not a coming to settle on a tenement to confer on a settlement. 5 M. & S. 136.

28. A soldier whilst his regiment lay in barracks at *B.*, took a house there for himself and family, of the yearly value of 10*l.*, and re-  
sided

sided more than forty days. Held, that this was a coming to settle in a tenement, and that he thereby gained a settlement. 1 B. & A. 270.

29. A pauper by occupying a freehold estate of his own, and also other lands as tenant, the whole being of the aggregate annual value of 10*l.*, does not thereby gain a settlement, it being necessary under the 13th and 14th Car. 2. c. 12. that he should come to settle on all the property in the character of tenant. 1 B. & A. 481.

30. A pauper employed as a labourer by the board of ordnance, having previously occupied a house at an annual rent of 7*l.*, which was then purchased by the board, still continued to reside in part of the premises at a weekly rent of 2*s.*, which was deducted out of his wages, and during such last occupation, he also occupied a shop, the shop and house together being of the annual value of 10*l.*, and upon his dismissal from his employment, he gave up possession of the house as required. Held, that his last occupation of the house was not as tenant, but as servant, and that no settlement was thereby gained. 1 B. & A. 473.

31. Where there is no custom for that purpose, the lord of a manor cannot make a new grant of copyhold, and if he does, the grantee acquires thereby no settlement by estate. Held also, that a grant by the lord of copyhold land paying a yearly rent of 2*s.* 6*d.* (which rent in a subsequent part was called a quit rent) is a purchase within 9 G. 1. c. 7., and being under 30*l.* confers no settlement. 2 B. & A. 189.

32. *J. F.* being seised in fee of a cottage, demised the same to the overseers of the poor for 1000 years, reserving a pepper-corn rent, and continued to reside there. Being sick, his daughter and her husband came by permission of the parish officers to reside with, and take care of him; after his death, the daughter being his heir, they continued to reside there above forty days, claiming a right to the possession. Held, that they thereby gained a settlement, being entitled to the reversion, and the residence not being fraudulent. 2 B. & A. 527.

33. Where a pauper was legally sworn in borsholder at a court leet, and after executing the office for a few days he was afterwards by two magistrates discharged from executing his office, and another person appointed, but he acquiesced in this and did not in fact afterwards execute the office. Held, that this was not executing an annual office within the parish so as to confer a settlement. 4 B. & A. 619.

34. Where a pauper being settled by parentage in *A.*, at the age of thirteen years hired and served for a year in *A.*, and afterwards when he was sixteen years old, returned to and lived with his father's family until he became of age. Held, that having acquired a settlement of his own in it, he did not follow the settlement of his fathers, subsequently gained in another parish, whilst the pauper continued to reside with him. 3 B. & A. 377.

35. Where a pauper was bound apprentice to a certificated man, and during his apprenticeship, he being of the age of eighteen, his father gained a new settlement, and the pauper did not return to his father's house till after he was twenty-one. Held, that he was not emancipated, and that his settlement followed the new settlement of his father. 2 B. & A. 582.

36. A room in a parish workhouse licensed pursuant to 13. G. 3. c. 82. and appropriated to the reception of and used for the purpose

of delivery of pregnant women resident within the parish, whether settled there or elsewhere, and the expense of which room was defrayed in common with the general expenses of the workhouse out of the parish rates, is not an hospital or place within the 13 G. 3. c. 82. s. 3. 4 B. & A. 504.

### SEWERS.

- Assessments to.** 1. A tenement situate in the king's *Dock Yard*, deriving a benefit from the public services, and occupied by an officer of government who paid no rent, is liable to be rated to the sewers. 3 B. & A. 21.
- Drainage acts.** 2. A local drainage act provided that the owners and proprietors of lands (by and at whose expense certain banks should be made for the purposes of the drainage,) their heirs and assigns should be reimbursed such expenses, or such share thereof as should be ascertained by certain commissioners appointed under the act, and a subsequent act which imposed an additional tax upon those lands, provided that such tax should not be payable until the repayment of such of the above expenses as the owners and proprietors of the said lands for the time being should make appear to the satisfaction of the commissioners to have been necessarily expended in making banks. The act also contained clauses whereby tenants for life or in tail, were especially enabled to borrow money, and to charge the lands with it for the purpose of defraying the expenses of making banks under these acts. *J. S.* who had expended 800*l.* in making banks, afterwards sold his lands without reserving to himself, or taking any notice in the conveyance of the reimbursement above mentioned, and the commissioners having subsequently determined the amount of the reimbursement. Held, that the purchaser, and not *J. S.*, was entitled to receive it. 3 B. & A. 454.
3. If inefficient cause be shown against such an application, and the deputy remembrancer be attended to resist or diminish the sheriff's claim, he is still not entitled to the costs of either the application or the reference. 4 Price, 131.

### SHERIFF.

- Rights of.** 1. Sheriff claiming extra allowance, must apply to the Court, who will refer it to the deputy remembrancer, to ascertain what he is entitled to. It is a rule to show cause. A sheriff has no right to levy costs or poundage, or any incidental expenses, under an extent on a simple contract debt, neither has he or the attorney for the prosecutor of the extent, a right to receive any such costs, &c. under a compromise, in consideration of staying proceedings from the defendant, under duress of a seizure. If more than the precise debt be received by them under such circumstances, they will be ordered to restore it, and to pay the costs of an application to the Court, for the purpose of obtaining the order; and an assignee of a bankrupt defendant may apply. Such a motion may be made after an application to set aside the extent altogether, which has failed. 5 Price, 189.
- Privileges of.** 2. Where bail has been put in by a defendant, and not perfected, the sheriff's officer may put in and justify bail for his own indemnity. 5 Price, 558.
3. Where

3. Where a landlord has distrained for rent arrear, and the tenant has replevied the goods, and has sold a part on his own account, by permission of his landlord; if, in the mean time, the remainder are seized under an extent tested after the distress, for a debt due to the crown, which is satisfied thereout, according to the exigency of the writ, this Court cannot, in the exercise of its equitable jurisdiction, interfere to enlarge the time for the return of the process, that the sheriff may, in the interim, proceed under it against the defendant's lands for the landlord's indemnity, on the ground that the defendant had not, pending the distress, in point of fact, goods and chattels sufficient to satisfy the crown's debt, or in any way use the crown process in favour of the landlord, under such circumstances, and principally because on the levy having been made, the writ would be *co instanti functus officio*. 4 Price, 313. Return of.

4. Where the return to a writ of *latitat* stated that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the Court refused an attachment against the sheriff. 4 B. & A. 279.

5. *Semble*, that a return by the sheriff to a bill of *Middlesex*, stating that he took and detained the defendant until he rescued himself is sufficient, without naming the rescuers, or stating them to be people of the county; but return, not stating the arrest to have taken place in the county, was held to be bad. 1 B. & A. 190.

6. The sheriff, in Michaelmas term last, returned to a writ of *fi. fa.* "goods in hand for want of buyers, value unknown," and no further steps were taken by the plaintiff till Trinity term following. In the interim, the goods were seized under an extent by the crown. Held, that the court would not compel the sheriff to make good the loss to the plaintiff, and that they would quash a writ of *distringas* which had been issued for that purpose, although the plaintiff had given all the indulgence, with the advice desired, and concurrence of the sheriff's officer. 3 B. & A. 204. Liabilities of.

7. If a deputy-sheriff, being in possession of goods seized under an immediate extent, and having received a subsequent *feri facias* at the suit of a subject, contract with the judgment creditor to deliver him, in satisfaction of his execution, a certain quantity of the goods seized, on his paying into the sheriff's hands the debt due to the crown, which is accordingly paid to him; and if, afterwards, whilst his officer is in the act of delivering and measuring the quantity specified to the plaintiff's agent, to whom he had given up the key, the goods are rescued, the sheriff is liable to the judgment creditor, who may maintain a special *assumpsit* on the contract, (whether the sheriff be authorized so as to contract or not,) or on a common count for goods sold and delivered, or for money had and received. In the case of an under-sheriff in the country, employing an acknowledged town agent, such an engagement made by the latter is legal, and binding on the sheriff, who must seek his remedy over. 5 Price, 578. A beginning to measure and deliver, is not such a delivery as will satisfy even this special contract. *Ibid*.

8. The plaintiff's attorney directed the sheriff's officer, who had arrested the defendant, not to let him go at large, without an express consent from him, the attorney, as he had a lien for his costs. The sheriff's officer did, by the authority of the plaintiff in the action, but without that of the attorney, let the defendant go at large. Held, that the sheriff was not liable to the attorney for his costs. 2 B. & A. 402.

9. If a sheriff's officer, who arrests a defendant, demand and receive Of proceedings.

against, in general.

receive from him a larger sum than he is liable to pay as a caption fee, and for the expense of the bail-bond, &c. the court will, on motion, order it to be referred to the Master, to ascertain what the officer is entitled to on that account, and order him to restore the surplus to the defendant, and to pay the costs of the application. A charge of 2*l.* 13*s.* 6*d.* made on a defendant in fee, wholly disallowed by the master, on a reference to him under such circumstances. 4 Price, 309.

10. In an action brought against the sheriff for money levied under a *fi. fa.*, without any previous demand, the court will stay the proceedings, upon payment of the sum levied, without costs. 3 B. & A. 696.

Of proceedings against, in relation to bail.

11. The court will not set aside an attachment against the sheriff for not bringing in the body, on payment of costs, on the application of the defendant, who swore to merits, where it appeared that no bail-bond had been taken by the sheriff. 2 B. & A. 354.

12. After the sheriff had returned *cepi corpus*, the plaintiff brought an action for an escape, and recovered the debt. Held, that he could not, after this rule, compel the sheriff to bring in the body. 2 B. & A. 623.

13. The court will set aside an attachment against the sheriff for not bringing in the body, with costs, upon an affidavit that the plaintiff purposely prevented the defendant's being re-taken after a rescue, and that the application was by the sheriff himself, without negating the fact of his having an indemnity. 1 B. & A. 192.

## SHIP.

Owner.

1. In an action against several defendants, as ship-owners, for damage sustained by the loss of goods laden on board their ship, it was held that by the 53 G. 3. c. 159. s. 1. they were not liable in that character beyond the value of the ship and freight due, or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part-owner. Secondly, that the value of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage; and, thirdly, that in calculating the value of freight due, or to grow due, money actually paid in advance. 2 B. & A. 2.

2. Where *A.* having contracted for a ship to be built for him in the *East Indies*, agreed, during the time of the building, to sell a share to *B.*, and *B.* paid a part of the price in pursuance of the agreement, and afterwards, on the ship's arrival in *England*, *A.* caused her to be registered, and accounted with *B.* as part-owner, but *B.*'s name was never on the register as part-owner; held, that *B.* had no legal interest in the ship. 2 B. & A. 248.

3. The owner (in *England*) liable for money advanced to the master at his request for the necessary use of the ship, after her arrival in an *English* port; nor is the consent of the owner necessary to establish his responsibility. Nonsuit on that ground of objection set aside, and verdict entered for plaintiff, subject to an award of what should be found to be due for the necessary use of the vessel. 7 Price, 592.

4. A ship-owner is liable for necessary repairs done to a ship by the master's order, and the word "necessary" means such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, would order. 4 B. & A. 352.

5. The

5. The master of a ship has not a lien on the freight for his wages, Master. or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo. 1 B. & A. 575.

6. Where a ship registered at the port of *N.* was transferred by a deed of assignment to owners resident in *L.*, the ship being then in the port of *L.* Held, that this transfer was not within 34 G. 3. c. 68. s. 15., but within s. 16. of that act; and that the transfer was valid, although no indorsement was made on the certificate of registry. Held, also, that the non-compliance with 7 & 8 W. 3. c. 22. s. 21. does not avoid the transfer. 2 B. & A. 427. Sale of.

7. The importation of goods from *America* in a vessel *American* built, though owned by *British* subjects, is not legalized by 49 G. 3. Statutes. c. 59. 4 B. & A. 426.

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### SLANDER.

1. An action for defamation will not lie against a barrister for words spoken by him as counsel in a cause, pertinent to the matter at issue. In general. 1 B. & A. 232.

2. These words, "I will take him to *Bow Street* on a charge of forgery," are not actionable, because they do not amount to charge the person of whom they are spoken with felony. Of the personal character. 4 Price, 46.

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### SLAVERY.

A foreigner who is not prohibited from carrying on the slave trade by the laws of his own country, may, in a *British* court of justice, recover damages sustained by him in respect of the wrongful seizure, by a *British* subject, of a cargo of slaves on board of a ship then employed by him in carrying on the *African* slave trade. In relation to foreigners. 3 B. & A. 353.

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### SOUTH SEA COMPANY.

The 45 G. 3. c. 34. only repeals the navigation act as to foreign built ships, and does not confer upon them, when navigating under its provisions with the king's licence, all the privileges of *British* built ships, and therefore the former cannot trade to the western coast of *America* without a *South Sea* licence. 1 B. & A. 334. *Quære*, whether 42 G. 3. c. 77. authorizes *British* built ships so to trade without such licence? Ibid. Statutes relative to.

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### STAMPS.

1. A receipt for a promissory note, expressing a prospective and executory consideration, on which the money thereby secured is to be paid, may be given in evidence as a receipt on a receipt stamp, and does not require an agreement stamp, as evidence of a contract. Classing of instruments. 1 B. & B. 1.

2. Where *C.* was directed by a letter from *B.* to pay, out of the proceeds 3 E 4

proceeds of his goods then unsold in his, C.'s hands, a certain sum of money to D., which C. consented to do by letter D. (which letter was stamped with an agreement stamp), and these letters being given in evidence to prove that the money was paid by order of B., it was holden, that they did not amount to an agreement between B. and C., and, consequently, that the stamp was improper, and that the order itself for payment should have been stamped, as being an order for the payment of money out of a fund which might or might not be available within the meaning of the statute 55 G. 3. c. 184. Sched. Part x. 1 B. & A. 36.

Instruments liable or not to the duty.

3. A bill of sale of a ship is not void, though it omit to set forth the true consideration, and is not stamped with an *ad valorem* stamp; but the parties thereto are liable to a penalty. 5 M. & S. 228.

4. A valuation made of the parish lands by two resident parishioners, appointed for that purpose at a parish meeting by the parish officers, with a view of equalizing the rate to the relief of the poor, was held not to require an appraisement stamp, it being merely for the information of the parties employing the valuers. 5 M. & S. 240.

5. A letter from a principal to his factor, containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills of certain goods, then either in the factor's possession or about to be placed in his hands, should remain unsold at the time of the bills falling due, requires to be stamped, and does not come within the exception in the stamp act, as a letter for or relating to the sale of goods; the primary object of such letter not being the sale of goods, but the obtaining of an advance of money on the goods. 2 B. & A. 778.

Admissibility of unstamped instruments.

6. In an action on the common counts for work and labour: held, that the plaintiff, having established his case by other evidence, was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement which fixed the price, and which the defendant did not give notice to the plaintiff to produce. 8 Taunt. 327.

Admissibility of parol evidence.

7. Where an agreement on unstamped paper has been destroyed, no parol evidence can be given of its contents, even if it has been destroyed by the wrongful act of the party who takes the objection. 2 B. & A. 478.

8. An agreement in writing, unstamped, for the letting a tenement at a certain rent having been lost: held, that parol evidence of its contents was not admissible for the sake of proving thereby the value of the tenement. 3 B. & A. 588.

Restamping.

9. Policy of insurance on ship "at and from L. to her port or ports, place or places of discharge and loading in Africa and African islands, and during her stay there, and at and from thence back to L., to her final port or place of discharge in the United Kingdom, with liberty in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever as above; to sell, barter, and exchange goods, and land, unload, and reload goods at any or all of the ports and places she may call at or proceed to." The insured, subsequently to the execution of the policy, inserted after the words "during her stay," the words "and trade." Some of the underwriters assented to the alteration by subscribing their initials; others refused their assent. In an action against one who refused, held, that the alteration was immaterial, and did not avoid the policy. 1 B. & B. 426.

10. The

10. The addition of another obligor after the bail-bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligors, does not vacate the bond or make a new stamp necessary. 5 M. & S. 223.

11. Policy on goods at and from *Stockholm* to *Swinemunde*, and the ship being driven into *Wisby*, on 30th May, and detained there till the 9th October, the assured, on 1st July, wrote to their agents in *London*, "that the captain had been ordered to proceed to *Koningsberg*, as they were not certain whether the enemy might be at *Swinemunde* or not, and that the passage to *Koningsberg* was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters;" which letter the agents receiving on the 12th July, applied to the underwriters for their consent to alter the policy by adding the words "*Koningsberg*, or *Memel*," after "*Swinemunde*," which consent was obtained; and the ship and goods were afterwards lost on their voyage to *Koningsberg*. Held, that this alteration did not require a new stamp, being within 35 G. 3. c. 63. s. 13. 5 M. & S. 267.

12. A promissory note for the payment of 30*l.* at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding 30*l.* 4 B. & A. 204. Duty payable.

13. A promissory note payable two months after sight requires a stamp appropriated to a note payable more than sixty days after sight, or two months after date, date and sight not being, in this case, synonymous. 4 B. & A. 592.

14. The legacy duty on bequests of personal property in *India*, by will there, and administration granted under it there, is payable, if it be remitted to *England*, and applied by another administrator in *Scotland*, under administration granted in *England*. 7 Price, 560.

15. A trustee under a will, who pays the legacy duty upon an annuity after the expiration of four years from the death of the testator, may recover the amount of the duty from the legatee, notwithstanding a previous assignment of the annuity by such legatee. Vide 36 G. 3. c. 52. 1 B. & B. 391.

16. A deed executed and indorsed on a former deed, as a future security for advances made, and to be made, under the first deed, is exempted by 48 G. 3. c. 149. from an *ad valorem* duty, if the first deed be stamped with an *ad valorem* stamp. 5 M. & S. 228. Form of instrument.

17. The premium given by the parish-officers upon a binding out of a poor apprentice need not be set out in the indenture in words at length; such an indenture being exempted from any duty by 8 Anne, c. 9. s. 40., and the insertion of the premium being required for no other purpose but to ascertain the amount of the duty. 1 B. & A. 477.

## STATUTE.

1. An act of parliament giving a summary remedy to persons against defaulters, though in terms apparently prescribing such remedy, is cumulative, and does not take away the previous right to sue by action at law. 6 Price, 131. In general.

2. Held, that a reversion to the crown, expectant on the determination of an estate tail, granted by the crown to a subject for services, was not barred by either of two private acts of parliament which had been passed for confirming a settlement of the estate made Private.

made by the tenant in tail, which settlement purported to bar such reversion, both of those acts containing an express saving of the rights of the crown, but neither of them naming the crown in the body of the act; and the second act vesting part of the settled estate in trustees for sale, with directions to purchase other lands with the produce of such sale, to be settled in lieu of the lands sold, to the same uses as expressed in the former act. It was also held, that the trustees could not pass a fee simple in the settled lands, which they had sold under the second act, in conformity to the powers therein given to them. 8 Taunt. 1.

### TAXES.

#### Tax collectors.

1. A joint collector to taxes is liable for any deficiency in the collection for the year in the amount received by his coadjutor, although he has not himself collected during the time, and although his appointment may not have been quite formal, if he has in any manner acknowledged his appointment, or acted, or received a share of the poundage at any time. And the court will set *insuper* on him, although a re-assessment have been made on the parish, and the amount of the deficiency collected, and paid over to the receiver-general. And if he should have procured a rule to be made absolute for discharging a former *insuper*, and for the restoration of the money levied under it by *distringas*, without having served the order *Nisi* on the parish; the court discharging such a rule will do so with costs. 5 Price, 5.

2. If there be two collectors of taxes appointed under the 43 G. 3. c. 99. s. 13. for a single parish by the commissioners, one for one division of the parish, called the *Upper Parish*, and one for another called the *Lower Parish*, and they accordingly collect the taxes separately from the several inhabitants of their respective divisions—in case of a deficiency in the amount of the taxes collected, through the misconduct of either, the whole parish must be re-assessed, and not the particular district, the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises, although the taxes of the other division have been collected and paid over to the receiver-general, the appointment being held by the court to be considered as one appointment of two for the parish, which would be valid under the act, and not of one for each sub-division, which would be invalid—the converse of the decision in the case of *Barrs v. Digby and others*, 1 B. & P. N. R. 281. 7 Price, 594.

3. If the acting commissioners of the land-tax, assessed taxes, &c. refuse (unless indemnified) to make a re-assessment on the parish to which the deficiency applies in execution of the powers entrusted to them by the several acts of parliament, where *insuper* has been set on the parish whose collector is a defaulter, the court will order them to do so by rule to show cause in the nature of a *mandamus*. Service on their clerk ordered to be deemed good service. The crown is not limited to any time within which to make such an application. 6 Price, 103. And although it appeared from the condition of the bond that *H. W.* and *G. P.* were both appointed collectors, it was held, that such bond being for the due collection by *H. W.* only, might be put in suit against the surety, without first selling the goods of *G. P.* *Ibid.*

4. A bond, with one surety only, taken by commissioners of taxes under the 43 G. 3. c. 99. s. 13., is not therefore void. 2 B. & A. 431.

The

The office of collector under that act of parliament is an annual office, and therefore when a bond, after reciting the appointment of *H. W.* to be collector under the act, was conditioned for the due collection, by *H. W.*, of the rates and duties at all times thereafter, it was held, that the due collection of the rates for one year was a compliance with the condition of the bond. *Ibid.* Assumpsit for money had and received brought to recover the amount of an excessive charge made by the defendants as collectors on a distress for arrears of taxes. Held, that the defendants were not entitled to a month's notice before action brought, under statute 43 G. 3. c. 92. & 70., which provides that no writ or process shall be sued out of any thing done in pursuance of that act till after one month's notice. 1 B. & A. 42.

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### THEATRE.

In a conviction of defendant for causing to be acted at a certain place, called the *Cobourg Theatre*, in the parish of *St. Mary, Lambeth*, for gain and reward, a certain entertainment of the stage called *Richard the Third*; the evidence set forth was, that the defendant was seen once or twice at the rehearsals of *Richard*; that another person was stage-manager; that defendant engaged *J. S.* to perform, and gave him a check for the amount of his benefit. Held, that this was sufficient to warrant the justices in drawing the conclusion that the defendant caused the play of *Richard the Third* to be performed. 4 B. & A. 616. The conviction also stated, after the appearance and plea of defendant, that divers credible witnesses, to wit, *J. S.*, &c. came before the justices upon their several oaths, to them severally and respectively, and in the presence of the said *J. S.*, &c. duly administered. Held, that taking it altogether, it did substantially appear that the oath was administered to the witnesses in the presence of the magistrates. The evidence also stated that the *Cobourg Theatre* was in the parish of *Lambeth*, and the adjudication of the penalty was to the poor of the parish of *St. Mary, Lambeth*: held, that this was no variance, it not appearing that there were two distinct parishes so named. *Ibid.*

Licence.

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### TIME.

Where the sheriff took possession under *feri facias*, and at a Day. later hour of the same day, the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy, and by the statute of *James*, was a bankrupt from the time of his arrest. Held, that in an action by his assignees to recover the value of such goods, the court would notice the fraction of a day; and therefore that the sheriff, having entered before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover. 2 B. & A. 586.

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### TITHE.

1. Barren land is that which requires an unusual expense in manuring and tillage. 2 M. & S. 349. Exemption from.

2. An

2. An inclosure of common appurtenant is not exempt from specific tithes, from which the land to which it was appurtenant is. 3 Burr. 1975; 1 Blk. 402.

3. A presumption against exemption was, from uninterrupted enjoyment: held to arise, notwithstanding endowment in 1253. 16 East, 334.

4. Timber does not depend upon the girth of the wood, 4 M. & S. 135. Oak germins growing from old stools, the stumps of trees, which had each stood respectively above 20 years, are not. 4 M. & S. 131. The presumption is against prædial articles being exempt from tithes. 2 M. R. 173.

5. Land which is of a good natural quality shall pay tithe immediately, notwithstanding the 2 and 3 Edw. 6. c. 13., although the expense attending the breaking it up and liming it exceeds the return made to the farmer in the several first years of cultivating it. 5 M. & S. 166.

6. Husbandry horses being used occasionally for the farmer for other purposes or for other persons, does not deprive the farmer of his privilege of exemption where he would be otherwise entitled to it. 5 Price, 334.

Title to.

7. Perception, even by the rector of another parish, is presumptive proof of title against one not claiming them. 13 East, 251. The rector's right to the tithe of lambs vests at the time when they are yeaned; although the title cannot be set out until they are fit to be weaned. 1 B. & B. 84.

Grant of.

8. Tithes are grantable especially only. 3 Burr. 1873.

9. The words, "all tithes arising out of or respect of farms, lands," &c. are sufficient to pass the tithes of appurtenants. 7 T. R. 641.

Ejectment for,  
on a holding  
over.

10. On an ejectment for tithes on a holding over, an intention not to quit possession must be shown. 16 East, 53.

Modus.

11. A fixed day at, or time about which it is payable, is essential to the validity of a money *modus*. 12 East, 33.

12. The rankness of a *modus* must be decided by the jury. 2 Blk. 1237.

Composition for.

13. The determination of a composition for tithes must be by notice. Loft 6. And, *semble*, must be for six months. 1 B. & P. 458.

14. If a rector, &c. having made a composition, lease tithes, and the lessee makes no alteration in the composition; when the tithes revert to the rector, &c. the occupier will continue to hold under the composition originally made by the rector, &c.; and consequently, will be entitled to notice before the rector, &c. can take the tithes in kind. 1 B. & P. 458.

15. Where the lessee of tithes for one year underlets the occupiers, the lessee for the following year is liable to the owner, though no notice has been given to the occupiers to determine the composition. 3 Taunt. 95.

16. A notice to determine a composition of tithes must be unequivocal. A demand of "tithes vicarial," and refusal to receive the composition tendered thereupon, are not sufficient. 12 East, 83.

17. Where an occupier of land, who had been under composition for tithes, refused to pay the composition, or set out tithes in kind, alleging that he was exempted by a *modus*. Held, that in an action on 2 & 3 Edw. 6. for the treble value of the tithes, it was not necessary to prove a notice to determine the composition; the occupier's disclaimer of the rector's title to tithe in kind, rendering notice unnecessary. 1 B. & B. 4.

18. A

18. A composition is determined by the death of the incumbents. 10 East, 269.

19. Where the composition is continued, the late incumbent's right is the value of the title he would have received had there been no composition. 10 East, 269.

20. A composition is an admission by the occupier of the proprietor's title; operating as an estoppel. 2 Mars. 38. 6 Taunt. 333.

21. Evidence in support of a real composition must be referable to a deed of composition. 2 B. & P. 272.

22. Notice of setting out, is not necessary to tithing at common law, though it is by the ecclesiastical. 3 Burr. 1891. Mode of tithing.

23. The tithe ought to be so set out, and the nine parts left so long, that the parson may judge by the view whether it is fairly set out: 2 Taunt. 55.

24. A farmer, though he cannot wantonly, yet may necessarily, cut and tithe part of a field, and then proceed to another field. 12 East, 239.

25. Where a field lies in two parishes, the farmer is not bound to cut and tithe the whole of what lies in the parish in which he began to cut, before he proceeds to the other part. 12 East, 239.

26. The mode of tithing wheat is in the sheaf. 13 East, 261. 2 Taunt. 55.

27. Grass must have been tedded previous to putting into grass cocks. 10 East, 5.

28. The mode of tithing hay is in grass cocks. 2 Taunt. 55.

29. Hops are not tithable until after being gathered from the bind. 7 T. R. 86. 2 B. & P. 172.

30. The consideration of putting sheaves into shocks, and after rain opening them to dry, is sufficient to support a customary mode of tithing wheat. 1 M. & S. 66.

31. The consideration of putting barley, oats, peas, or vetches into cocks, and after rain opening them to dry and closing them, is not sufficient to support a customary mode of tithing barley. 1 M. & S. 66.

32. There cannot be a customary mode of tithing barley. 2 B. & P. 172. 7 T. R. 86.

33. The tithe owner is not entitled to use an extra occupation way; but only that ordinarily used. 2 N. R. 466. Tithe owner.

34. The action for treble value is an appropriate form for deciding the title to tithes. 8 East, 178. Loft. 283. N. B. The writer has seen an opinion of the late learned sergeant Williams denying this case. Of the action for treble value.

35. The party entitled when severed, must sue for the treble value. 1 B. & P. 458.

36. *Seemle*,—A lessee and farmer of tithes declaring as owner and proprietor, is bad. 5 Price, 334.

37. Where a declaration in debt for tithes under 2 & 3 E. 6. c. 13. s. 1. omitted to state that the tithes had been yielded and paid, and of right ought to have been paid within forty years next before the passing of the act. Held, that it was defective even after verdict, and the judgment was arrested. 4 B. & A. 655.

38. A *modus* is a defence to an action for treble value. 15 East, 641.

39. Proof of non-payment of tithes within living memory, is no defence to an action for treble value, where declaration avers that they were payable within forty years, &c. 5 T. R. 260.

40. In

40. In a suit of tithes, where the point in issue is, whether there exists a *modus* of a certain sum of money for a particular farm in a township within the parish, though the defendant will not in general be allowed to enquire whether other farms in the same township are not subject to the same payment, yet such enquiry may be made by the other side in cross-examination, to show that such payments cannot be a *modus* consistently with the evidence which has been previously adduced. 1 M. & S. 292.

41. In an action for treble value, the plaintiff must prove a valid title, or perception of tithes, or a composition formerly made. A treaty for a composition which went off will not do. 1 B. & P. 458.

42. An answer to a bill filed in the Court of Exchequer, in a suit instituted for tithe hay, by a vicar, against the rector and others, (owners of lands in the parish) in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence in an action for tithes by a succeeding rector, against owners or occupiers of the same lands, for the tithes of which the former suit was instituted. 15 East, 334.

43. In an action for treble value costs are not due, unless the single value has been found by a jury not to exceed twenty nobles. 1 H. B. 167.

44. In an action on 2 & 3 Edw. 6., where the first count is for treble value of the tithes, and the rest for the single value, a verdict be entered for the plaintiff on the whole declaration by consent, subject to the award of an arbitrator who directs the *postea* to be indorsed "30s. treble value of the tithes, damages 1s., costs, 40s.," held to be within the 8 & 9 Wm. 3., and that the plaintiff is entitled to his costs of suit, a rule obtained on a motion founded on an opinion that a plaintiff was not so entitled under such circumstances, discharged with costs. 3 Price, 474.

45. *Semble*. A farmer claiming the exemption (under the custom) from tithes for green cut food applied for foddering husbandry horses, must show that such horses were *bond fide* used in husbandry, and that he had no other sustenance (of any sort) for them on his farm. Both those points are questions of fact, and the finding of the jury is conclusive. 5 Price, 334.

46. A new trial may be granted in an action for treble value. 6 Taunt. 297.

47. The amount of the tithes sought to be recovered being small, is a ground for refusing a new trial, or at least a second new trial, *Garrow, B. dubitante* on a question like the present, in an action affecting a right, and likely to be of frequent recurrence, and therefore important in the first result. 5 Price, 334.

Remedy for not removing.

48. The remedy for not removing is by action or distress. Cannot turn in cattle upon the land, out of which, &c. 8 T. R. 72.

49. To an action for not removing tithe, a general notice to remove all the tithes of his lands, having a few days before been preceded by a notice that they would be set out, specifying their kind, and from what land, is sufficient. 11 East, 358.

50. Where tithes are set out on the day specified in a previous notice, a second notice to remove them, though they have then become rotten, is sufficient to maintain an action for neglect. 11 East, 358.

## TOLL.

1. A prescription for toll of corn brought into a town to be sold on a market-day there, whereof any part is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market. 4 B. & A. 559. Market toll.

2. A bridge is not a highway within the meaning of the 13 G. 3. c. 84. s. 60., by which carriages employed in carrying materials for the repair of any turnpike-road or public highway, are exempted from toll, and, therefore, toll is payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike-road. 2 B. & A. 49. Exemption from.

3. Where a turnpike act exempted persons from toll "in going to and returning from their proper parochial church, chapel, or other place of religious worship on Sundays;" held, that the word (parochial) extended over the whole clause, and, therefore, that a dissenter was not within the exemption in going to and returning from his proper place of religious worship, situate out of the parish in which he resided. 2 B. & A. 206.

## TRESPASS.

1. A judgment in ejectment upon the several demises of two, was held to be evidence to support trespass *quare claus. freg.* brought by them jointly. 5 M. & S. 64. To real property.

2. In trespass, the declaration was for taking goods, chattels, and effects. Held, that the plaintiff might recover the value of fixtures under these words. 4 B. & A. 206.

3. To trespass *quare clausum fregit*, defendant pleaded not guilty, and a justification of a right of way; plaintiff, in replication, admitted the right of way, and new assigned *extra viam*. The plaintiff having obtained a verdict on the new assigned, with 1s. damages, was held entitled to the full costs. 3 B. & A. 443.

## TRIAL.

1. In a cause concerning rights of chace, involving documentary evidence of great length and antiquity, together with much oral testimony, the court would not grant a trial at bar, a new trial having recently been refused in K. B., where another defendant, who had contested the same rights, had obtained a verdict. 1 B. & B. 265. In civil cases.

2. Where the plaintiff, having omitted to give due notice of trial, enters his record on the marshal's book, subsequent to the entry of the defendant's record by *proviso*, upon which due notice of trial has been given; it was holden, that the defendant had a right to go to trial on his record, and that the plaintiff not having then appeared, was properly nonsuited. 1 B. & A. 253.

3. Rule as to notices of trial. 4 Price, 4.

4. It is not necessary, in case of a trial by *proviso*, after a lapse of four terms, without any proceeding, to give a term's notice. 2 B. & A. 594.

5. The

5. The fact of a cause being in the written list at *Nisi Prius*, is notice to the attorney, that it may be tried at any time in the course of the day, and, therefore, where a cause had been for several days in that list, and was, at length, tried out of its order as an undefended cause, in the absence of the defendant's attorney; the court granted a new trial only on payment of costs. 3 B. & A. 928.

6. The court will permit a suggestion to be entered on the record, for the purpose of carrying the trial of a misdemeanor into an adjoining county, where there appears a reasonable ground, on the affidavits, for believing that a fair and impartial trial cannot be had in the county where the venue is laid, and the suggestion need not state the facts from whence such inference is to be drawn. 3 B. & A. 444.

### TROVER.

By whom maintainable.

1. Where plaintiff sold goods to T., who paid for them, and was to take them away, but defendant becoming possessed of the place in which the goods were deposited, plaintiff's attorney, accompanied by T., demanded them of defendant, telling him that they belonged to plaintiff, and that they had sold them to T.; to which defendant answered, that he would not deliver them to any person whatsoever, and afterwards, plaintiff repaid the money to T., and brought trover against defendant. Held, that this demand and refusal were sufficient evidence of a conversion to support the action, and that a new demand by the plaintiffs, after they had repaid the money to T., was not necessary. 5 M. & S. 105.

Conversion.

2. Where A. consigned the goods of B. to C., and C., without notice of the right of B., sold a part, and kept the remainder in his possession. Held, that C. was liable in an action of trover by B. for the value of the goods that were sold, as well as for those that remained in his possession. 8 Taunt. 237.

3. Trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery has occurred by mistake only. 2 B. & A. 702.

4. Held, also, where a tenant had come into possession of the premises in 1816, and the lessor of the plaintiff claimed under a writ of *elegit*, and inquisition thereon issued in 1818, but founded on a judgment recovered to 1816, that no notice to quit was necessary. *Ibid*.

### TRUST.

Surrender.

1. A term of years was created in 1762, and assigned over to a trustee in 1779, to attend the inheritance. In 1814, the owner of the inheritance executed a marriage settlement, and in 1816, he conveyed his life-interest in the estate to a purchaser as a security for a debt, but no assignment of the term, or delivery of the deeds relating to it, took place on either occasion. In 1819, an actual assignment of the term was made by the administrator of the trustee in 1779, to a new trustee for the purchaser in 1816. Held, that under these circumstances, on an ejectment brought by a prior incumbrance against the purchaser, the jury were warranted in presuming that the term had, previously to 1819, been surrendered. 2 B. & A. 782. A term of

1000 years was created by deed in 1717, and in 1735 was signed, for the purpose of securing an annuity to *A.*, and after that to attend the inheritance. *A.* having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance, and her devise from 1735 to 1813, without any notice having been in the mean time taken of the term, except that in 1801, the devisee, in whose possession the deeds creating it and assigning it were found, covenanted to produce those deeds when called for. Held, that under these circumstances, the jury were warranted in an ejectment brought for the premises by the heir at law to presume a surrender of the term. 2 B. & A. 710.

2. The trustees, under a marriage settlement of stock, the dividends of which they covenanted to permit the bankrupt to receive for his life, executed after his bankruptcy a power of attorney to *A.* to receive the same. *A.* received the dividends, and paid them over to the wife of the bankrupt, save one sum, which he paid to one of the trustees. Held, that the assignees might recover the amount of such dividends from the trustees, in an action for money had and received. 8 Taunt. 263.

Ex-officio notice of.

### USE AND OCCUPATION.

1. Where an owner of an estate contracts to sell to another, who thereupon sells a part of the property so contracted for by auction to a third person, and he (the sub-vendee), gets possession, and the original vendor afterwards refuses to perform his contract, which occasions a suit in equity pending, which the original vendor obtains possession from the sub-vendee on a demand to be restored to it, it being rumoured that the original purchaser had failed in the suit instituted for specific performance. If in fact the plaintiff should ultimately succeed in that suit, and the estate is in consequence conveyed to the purchaser under a decree of the court, the sub-vendee may maintain use and occupation against the original vendor for all the time during which he held the possession so obtained from the second purchaser. 6 Price, 157.

By whom maintainable.

2. The husband is not liable in an action for use and occupation to pay for the enjoyment of a house by his wife *dum sola*. 1 B. & B. 50.

Against whom maintainable.

### USURY.

1. If the drawer of a bill of exchange, (which has been accepted by the drawer,) made payable to his own order and endorsed by him, gets another person to procure cash for it, who does so by allowing more than the legal discount to be taken on it, it is usurious for not being drawn for the benefit of such third person, but of the drawer himself, it is not a sale of the bill by such third person, but an advance of money by way of discount to the person making it, and on his credit. Such a bill getting into the hands of the crown under an extent against the party who discounted it, is equally invalid as if it were still in his possession. 4 Price, 50.

What contracts are usurious.

2. Where a builder having taken ground on a building lease at the ground rent of 108 $\frac{1}{2}$ %, assigned over his lease to *A.* for a sum considerably

siderably exceeding the then value of the premises, and at the same time took a lease from *A.* at an increased rent of 395*l.*, and containing the same covenants for building as the original lease, together with a stipulation of being allowed to repurchase the lease at the same sum for which it was assigned by him to *A.* Held, that under these circumstances, it was properly left to the jury to say, whether this was a purchase, or an usurious loan; and the jury having found it to be the latter, the court refused to disturb the verdict. 3 B. & A. 664.

What contracts  
are not usurious.

3. On the 11th *May*, 1816, *A.* borrows of *B.* 80*l.* On the 9th of *June*, 1817, *A.* and *C.* give *B.* for that loan a note of hand for 87*l.* 3*s.* payable by four instalments; viz. on the 29th of *September*, and 25th of *December*, 1817, and the 25th of *March*, and 24th of *June*, 1818, with an agreement that the whole 87*l.* 3*s.* should be payable on default of any one instalment. Held, that the agreement was not usurious. 1 B. & B. 447.

Its effect on col-  
lateral or subse-  
quent contracts.

4. A bill of exchange affected by usury being in the hands of an innocent holder, the latter, on being informed of the usury, takes a fresh bill in lieu of it, drawn of the parties to the original usury, and accepted by a third person for the accommodation of the other party. Held, that he cannot maintain an action against the acceptor of this substituted bill. 2 B. & A. 588.

### VAGRANT.

Conviction of.

*A.* conviction stated, that plaintiff having been brought before a magistrate, on an information charging him with having unlawfully returned without a certificate to a parish from which he had been removed, and that upon that occasion he confessed himself guilty. Held, that this conviction was good upon the face of it, and that it was not necessary to state in it expressly any act of vagrancy, it being for the party convicted to show in his defence that he did not return in a state of pauperism. 3 B. & A. 103.

### VARIANCE.

In general.

1. The plaintiffs declared that they agreed to sell, and that the defendants agreed to buy certain goods and merchandizes, to wit, three hundred and twenty-eight chests, and thirty half-chests of oranges and lemons, at and for a certain specified price, also laid under a viz. The contract proved was for three hundred and eight chests, and thirty half-chests of China oranges, and twenty chests of lemons, without specifying price. Held, that there was no variance, the price and quantity being laid under a viz. 8 Taunt. 107.

2. The declaration stated that *A.* was indebted to the plaintiff in a certain sum, to wit 26*l.* 13*s.* 6*d.*, being the balance of a certain larger sum; that, in consideration that the plaintiff would forbear to sue *A.*, the defendant undertook to accept a bill for the said balance of 26*l.* 13*s.* 6*d.* The actual balance due was only 26*l.* Held, that although the sum in the statement of the contract was not laid under a viz., yet as it referred to the inducement where the sum was laid under a viz., and as the substance of the contract was to pay the balance due, there was no variance. 8 Taunt. 197.

3. In

3. In *assumpsit* by one of two surviving partners, the fact of the plaintiff being surviving partner must be stated in the declaration; and therefore a count for goods sold by him to defendant is not supported by proof, that the goods were sold by the plaintiff and his deceased partner. 4 B. & A. 374.

Of variance in the description of contracts and written instruments.

4. Where a lease was stated in the declaration to be made by the plaintiff on the one part, and *T. R.* on the other, but turned out on evidence to have been made by the plaintiff and his wife on the one part, and *T. R.* on the other. Held, (*Dallas, C. J. absente*) that this was no variance. 1 B. & B. 443.

5. Declaration stated that defendant bargained for and bought of plaintiffs of *East India* rice according to the conditions of sale of the *East India* Company, to be put up at the next *East India* Company's sale, by the proprietors, if required, at a certain price there mentioned. The proof was, that, besides these conditions, the rice was sold per sample. This is no variance, the words "per sample" not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality. The rice did not correspond with the sample, but the defendant, after seeing fresh samples inferior in quality to the original purchase sample, put it up at the *East India* Company's sale at a limited price, and no bidding taking place to that extent, he bought it in. Held, that he could not afterwards repudiate the contract. 4 B. & A. 387.

6. In an action of covenant the declaration stated, that by a certain indenture it was witnessed, that as well in consideration of certain furnaces to be erected by the plaintiff *T. R. B.* did demise, &c. The defendant pleaded *non est factum*. On producing the deed in evidence, it appeared to be, that as well in consideration of the erection of the furnaces, as also for building certain houses and payment of rent, *T. R. B.* did demise, &c. Held, that this was a fatal variance. 2 B. & A. 765.

7. The declaration stated, that a bill of exchange was drawn and accepted at *Dublin*, to wit, at *Westminster*, &c. for a certain sum therein mentioned, without alleging it to be at *Dublin* in *Ireland*. Held, that the bill upon this declaration must be taken to have been drawn in *England* for *English* money, and therefore proof of a bill drawn at *Dublin* in *Ireland* for the same sum in *Irish* money which differs in value from *English* money, did not support the declaration, and that this was a fatal variance. Held, also, the bill having been drawn for a certain sum sterling, that the omission of the word sterling in the declaration was immaterial. 2 B. & A. 301.

8. The contract laid in the declaration, was to deliver stock of the 27th of *February*. The contract proved was to deliver stock on the settling day, which at the time was fixed for, and understood by the parties to mean, the 27th of *February*. Held, that the proof supported the declaration. 2 B. & A. 335.

9. One count of the declaration stated the consideration of a guarantee for 5000*l.*, to be a certain credit to be given by *C. and Co.* to *V. and Co.*, in a manner then and there agreed upon between the parties. The evidence to support this allegation consisted of letters to the following effect. "My son informed me he was about to enter into some arrangements of a pecuniary nature for the house of *V. and Co.*, in which he is a partner, and that it would be advantageous to have such arrangements, or part of them, carried into effect by drafts by me on you, payable to him or his order, and that he was persuaded I would guarantee your ultimate security. I therefore give

you

you such guarantee to the amount of 5000*l*. I find that the house of *V. and Co.* has deemed it expedient to establish a credit with some house in *London*, upon such terms as may be agreed upon by the parties, and that my son has written to you to fix that credit with you, not doubting that I would guarantee your ultimate security. My regard for my son induces me to give the guarantee in question. I gave you a letter of ultimate guarantee to the amount of 5000*l*., for such arrangements of a pecuniary nature, as my son might enter into with you, or for such part of them as might be carried into effect by drafts by me on you, payable to him or order, and as I am since informed, that such arrangements have been, or are about to be, extended to the amount of 8000*l*., I give you my ultimate guarantee for the additional sum of 3000*l*. My guarantee for 5000*l*. my guaranteeing temporary aid on an emergency, my guarantee in the same year for 3000*l*., which last in its plain sense marks the event of the temporary aid, make the whole of my guarantee against ultimate loss 8000*l*., and distinctly limit it to that amount." Held, that there was no variance between the contract above stated, and that made out by this evidence. Another count supported by the same evidence, stated the consideration of the guarantee to be, "that *C. and Co.* would give *V. and Co.* credit, in manner then and there agreed upon," and the promise given on such consideration, to be a guarantee for 8000*l*. Held also, that there was no variance between this statement and the evidence adduced in proof of it. 1 B. & B. 523.

10. In the recital of a bond, the differences were said to exist between the above bounden *A. B.* and *C.*, and the above named *D. E.* and *F.*, the declaration, in setting out the bond, laid the differences to exist between *A. B. C. D. E.* and *F.* Held, that this was no variance. 1 B. & B. 350.

11. Where the contract declared upon, was, that plaintiff had bargained and sold, and defendant agreed to buy a large quantity of head matter and sperm oil, which was afterwards ascertained to be a given quantity, and the contract proved, was, for the purchase of all the head matter, and sperm oil, per the Wildman: held, that this was no variance. 1 B. & A. 9.

12. Declaration by *B.*, a treasurer of a friendly society, on a bond to *A.*, then being treasurer; plea *non est factum*, the bond given in evidence was to *A.*, without stating him to be treasurer to the society. Held, that *B.* was entitled to recover. 1 B. & A. 57.

13. Declaration stated bill of exchange to be drawn upon, and accepted by three persons, it was proved to have been drawn upon and accepted by the three jointly, with a fourth. Held, that this was no variance. 1 B. & A. 224.

14. A bill of exchange drawn by *J. S.* to his own order, value received, means value received by the drawee, and if it be alleged in the declaration to be for value received by said *J. S.*, it is a variance; proof of the acknowledgment of one item of debt only, is good to support a count upon an account stated. 5 M. & S. 65.

15. The count stated that the plaintiff had retained the defendant, as agent, to cause the plaintiff's ship to proceed to *Gottenburgh*, in order that she might proceed to *St. Petersburg*; the chief evidence adduced in support of this allegation, was a written arrangement agreed upon between the plaintiff's managing clerk, and the defendant, in which it was ordered, "that the ship should touch at *Gottenburgh*, to know the state of things in *Russia*, and receive instructions." And, "that the captain should consign the ship to defendant's

Of variance in  
the description  
of torts.

ant's correspondents at *St. Petersburg*, or any other place she might land her cargo at:" and a conversation between the plaintiff's clerk and the defendant, in which defendant said "he had insured the ship from *Falmouth* to *Sheerness*; she would join convoy to go to *St. Petersburg*." Held, that there was a fatal variance between the count and the evidence. 1 B. & B. 508.

16. Declaration stated that defendant went before one *R. C. Baron Waterpark, of Waterfork*, in the county, &c., and proof was, that he went before *R. C. Baron Waterpark, of Waterpark*, in the county, &c. Held, that the allegation in the declaration, was a description of a name of dignity, and therefore that this was a fatal variance. In a count for slander, the words were, "This is my umbrella; he stole it from my back door;" the words proved were, "it is my umbrella," &c. And it appeared that these words were not spoken in the house where the umbrella then was. Held, that the evidence did not support the declaration, inasmuch as the words laid, imported to be spoken, concerning a thing then present, and the words given in evidence were actually spoken concerning a thing not present at the time. 2 B. & A. 756.

17. Where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses; held, that they were properly described as owners and proprietors of it, in a declaration against a defendant, for an accident arising from his servant's negligence in driving against the chariot. Held also, that where defendant's servants wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, and thereby produces the accident, his master is not liable; but where in the course of his employment he so strikes, although injudiciously, his master is liable. 3 B. & A. 590.

18. In an action for disturbance of plaintiff's right of common, the declaration stated, that he was possessed of a messuage and land with the appurtenances; and by reason thereof ought to have common of pasture, &c. Held, that this allegation was divisible, and that proof that plaintiff was possessed of land only, and entitled to the right of common, in respect of it, was sufficient to entitle him to damages *pro tanto*. 3 B. & A. 360.

19. A count for diverting and turning a stream of water, is not supported by proof of penning back, and checking it, whereby the water was made to overflow the plaintiff's meadow. 6 Price, 1. A nonsuit directed on such evidence given on that count confirmed, on motion to set it aside. *Ibid*.

20. An averment in a declaration, that defendant's dogs were accustomed to worry and bite sheep and lambs, is not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men. 1 B. & A. 620. *Semble*, however, that an averment that the dogs were of a ferocious and mischievous disposition, would be sufficient in an action brought for an injury to plaintiff's sheep, without alleging specifically that they were accustomed to bite and worry sheep. *Ibid*.

21. An averment in a declaration for disturbing the plaintiff's right of common, that plaintiff was entitled to common of pasture, for all his cattle, levant and couchant upon his land, is well supported by evidence, that the plaintiff was a part-owner with defendant, and others, of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out in common their cattle: the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon such land during the winter;

and although the custom proved was to turn out in proportion to the extent, and not to the produce of the land, in respect of which the right was claimed. Held also, that it was not necessary to state his right to be with the exception of his own land, but that it was well laid to be over the whole common. 1 B. & A. 706.

22. In ejectment the demise was laid to be by the mayor, burgesses, &c. of the borough town of *M.*, and on the trial, it turned out from the charter, that the name of the corporation was "the mayor, &c. of *M.*" Held, that this was no variance, it appearing from the charter, which was in evidence, that *M.* was a borough town. 1 B. & A. 699.

Of variance in  
indictments.

23. Upon an indictment for an assault upon *E. E.* it is sufficient to prove, that an assault was committed upon a person bearing that name, although it appear that two persons bore the same name, *E. E.* the elder, and *E. E.* the younger. 3 B. & A. 579.

Of variance in  
the description  
of statutes.

24. It is not a fatal variance (after verdict) where an information professing to set out the title of an act of parliament describes it as entitled an act, &c. for repealing duties on salt, and the drawback, &c. "thereon," the title being (in fact) in the same words, with the exception of having the word "thereout" instead of "thereon," (and adding) and for granting other duties, &c. "thereon," the concluding word being the same. 4 Price, 237.

Variance in the  
description of legal  
proceedings.

25. The declaration in an action for maliciously causing a writ to be sued out, whereon plaintiff was imprisoned, stating the process with *acetiam* clause as sued out for 50*l.* (instead of 30*l.* according to the fact,) and an endorsement for 15*l.* the warrant being for 30*l.*, it is a fatal variance. 5 Price, 540.

26. In assumpsit for not indemnifying plaintiff, in consequence of his having become bail for *A.* in an action at the suit of *B.*, it was stated that *B.*, in Michaelmas term, 58 G. 3., recovered against plaintiff; the judgment given in evidence, was Hilary term. Held, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of the action. 4 B. & A. 435.

Variance in the  
description of a  
custom.

27. A plea to a *quo warranto* stated that an immemorial court leet was in part holden in the morning, and in part in the evening, and that the custom had to elect the mayor, at the morning court, which burgess had been accustomed to be sworn into the office at the evening court, by the steward or his deputy; the replication denied the mode of election, and there was also an issue "not duly sworn" at the trial; it appeared, that in addition to the custom set out in the plea, it had been usual for the leet jury to present in writing the candidate who had most votes at the morning court, to be sworn in by the steward at the evening court, but they had no control over the poll. Held, that this was a mere ministerial act on their part, and that it was no essential part of the custom, and need not be stated on the record. 3 B. & A. 190.

Miscellaneous.

28. Where the declaration alleged that the defendant was overseer of the township of *S.*, and it was proved that he had acted as such, and there was no evidence of overseers having been appointed for the parish of *S.* Held, that although the appointment was produced, and purported to be an appointment of the defendant as overseer of the parish of *S.*, this was no variance. 1 B. & A. 94.

VENDOR

## VENDOR AND PURCHASER.

1. An action for goods sold and delivered, not supported by proof of an order by defendant, to send the goods to a certain quay, to be left till called for, without showing a reception and acceptance on the part of the vendee of the goods so sent, where the defendant had not named the particular carrier by whom the goods were to have been conveyed : at least under the circumstances in evidence, in the present case, a nonsuit for want of proof of a delivery was refused to be set aside. 5 Price, 630. Sale, when complete.

2. Where plaintiffs having received an order from defendant for goods, shipped them, and transmitted to him the bill of lading endorsed, making the goods deliverable to order or assigns, and on their arrival the captain withheld the goods, in consequence of defendant having refused to accept a bill drawn on him for the price; and thereupon defendant recovered in trover against the captain. Held, that plaintiffs might have an action for goods sold and delivered, for the delivery of the goods was complete as between them and defendant, by the delivery on board the ship. 5 M. & S. 189.

3. By the usage of *Liverpool*, the vendor of goods was to pay warehouse-rent for two months after the sale, if the goods remained there so long. Held, however, that where the vendor of such goods had, within the two months, given the usual order for delivery to the purchaser, the property in the goods from that time vested in the latter, and that he became responsible for all accidents which might happen to them; and that the circumstance of the goods having within that time been distrained for warehouse-rent, was an accident which must fall on the vendee, and such rent having been paid by the vendor's agent, in order to redeem the goods: Held, that the latter could not recover the same from the vendor as money paid to his use. 2 B. & A. 131.

4. A quantity of oats having been consigned by a merchant abroad to be sold by *J. S.*, who was a merchant as well as factor, he placed them in the hands of *A.*, a corn-factor, as a security for advances made by him, but the oats were not to be sold without the consent of *J. S.* They remained in *A.*'s possession upon these terms for nine months, when they were transferred to *A.* by a sale at the market-price. No money actually passed, nor were any account-sales rendered; but the amount of the price was allowed in account before *J. S.* and *A.*, leaving a balance in favour of the latter. Held, that this was in substance a pledge and not a sale by the factor, and that no property passed to *A.*, although the jury had found it to be a *bond fide* transaction. 4 B. & A. 444. Contract of sale.

5. An assignment of the freight, earnings, and profits of a ship, does not extend to profits not in existence, actual or potential, at the time of the assignment; therefore, where *C.* assigned by deed to *S.* the freight, earnings, and profits of the ship *W.*, which ship afterwards, in a voyage to the *South Seas*, obtained a quantity of oil, the produce of whales taken in the said voyage: Held, that this did not pass to *S.* by the assignment; for the assignor had no property, actual or potential, in the oil, at the time of assignment, and the voyage was not then contemplated. 5 M. & S. 228.

6. A trader in *London* was in the habit of purchasing goods at *Manchester*, and exporting them to the continent soon after their arrival Stoppage in transitu.

in *London*. The goods so consigned to him remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. A consignment of goods for the trader was delivered to the defendants, on the 9th and 12th of August; on the 14th and 17th the goods arrived at the waggon-office of the defendants; on the 16th or 17th the trader became bankrupt; and on the 19th, notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order, on the 21st delivered the goods to a third house. Held, that the assignees of the bankrupt were entitled to recover the goods deposited with the defendants, and that the right of the consignor to stoppage *in transitu* ceased on the arrival of the goods at the waggon-office of the defendants in *London*. 8 Taunt. 83.

### VENUE.

#### Changing.

1. The Court will not grant a motion for changing the venue after plea pleaded; the plaintiff may retain the venue notwithstanding a motion to change it, on undertaking to give material evidence arising either in the county laid or in a third county; proof of letters containing the promise, upon which the action is brought, written and put into the post-office in the third county, is sufficient to satisfy such undertaking. 8 Taunt. 169.

2. If a small part only of a plaintiff's demand be on a bill of exchange, and the bulk of the debt be for goods sold and delivered, for part of which the bill was given, the Court will not bring back the venue (which had been changed on the usual affidavit) on the ground of the action being brought upon a bill of exchange. 7 Price, 564.

#### Retaining.

3. The venue having been changed by the defendant from *London* to *Staffordshire* on the usual affidavit, the Court refused to bring back the venue to *London* on an affidavit that the cause of action arose partly in *Staffordshire* and partly in *Worcestershire*, and that a material witness resided in *London*, and on the plaintiff's undertaking to give material evidence in one or other of those counties. 2 B. & A. 618.

4. The Court will discharge a rule obtained by a defendant to change the venue in an action against him by the assignees of a bankrupt, on the usual affidavit that the cause of action arose in another county, and that his witnesses reside there; the plaintiff, swearing that the cause of action arose in a third county, and that his witnesses reside at a very considerable distance from the county to which the venue is sought to be removed, and undertaking to give evidence in the original or the third county; and that although the defendants have agreed to admit every fact establishing the bankruptcy, except the petitioning creditor's debt. 5 Price, 359.

5. Where a venue laid in *Middlesex* had been changed to *Stafford*, on the usual affidavit, the Court refused to bring it back on an affidavit, stating, that the goods (which had been purchased and paid for by plaintiff as agent for defendant, and for which the action had been brought,) were partly paid for in *London* and partly in *Surrey*, and were sent to *Paddington*, in the county of *Middlesex*, to be forwarded thence to defendant; the plaintiff undertaking to give material evidence in *London* or *Middlesex*; he must undertake to give material evidence in the county in which he originally laid it. 6 Price, 336.

6. In an action for a libel contained in a letter, the Court would not change the venue from *London* to *Worcester*, after an affidavit that the deponent believed the letter to have been written at *Stafford*, because it bore the *Stafford* post-mark. 1 B. & B. 299.

7. Where a rule *Nisi* has been obtained for changing the venue from *London* to *Yorkshire*, in Easter Term, as of course, on the common affidavit (not stating that defendant's witnesses resided there), the Court will not retain it on cause shown that the plaintiff would be materially delayed, without any other advantage to the defendant by analogy with the established rule that the venue cannot be changed into the northern counties, previous to a spring assizes. 5 Price, 612.

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### VERDICT.

1. Where, in an action of trespass to a fishery, the jury find the defendant justified on one issue, and state the right under which they found him justified, such a finding may be treated as a special verdict. 8 Taunt. 188. Special.

2. The Court will not infer, or take notice of any fact, not expressly stated to have been found by the jury, in an argument on a special verdict. 4 Price, 240.

3. After trial, an affidavit tending to impeach a verdict by stating corrupt motives in one of the jurors, cannot be received. 8 Taunt. 26. Misconduct in the jury.

4. In assumpsit, the defendant pleaded that the promises were made by him jointly with another, and issue was taken upon that fact. The jury, by their verdict, found that the defendant promised, without stating whether he promised alone, or jointly with another. Held, that this verdict was bad, because it did not distinctly pronounce upon the issue. 3 B. & A. 605. Miscellaneous.

5. The Court may order a verdict to be entered for the plaintiff where the cause was undefended at *Nisi Prius*; and the judge directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. 4 B. & A. 413.

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### WHARF.

The wharfage, &c. due upon goods imported, was, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not. The goods were sold to A., and after Christmas the merchant importer became bankrupt. Held, that there was no lien on the goods for the wharfage, &c. as against A. 4 B. & A. 50. Wharfinger.

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### WINDOW LIGHTS.

Where lights had been enjoyed for more than twenty years, contiguous to land, which within that period had been glebe-land, but was conveyed to a purchaser under the 55 G. 3. c. 147., it was held, that no action would lie against such purchaser for building, so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could Title to.

could not grant the easement, and, therefore, no valid grant could be presumed. 4 B. & A. 579.

## WINE.

## Removal of.

In an action against a wine cooper, for changing on the road, wine which he had been hired to carry from one house to another, the court will not presume that the wine was removed for the purpose of sale, and so consider the transaction illegal under the Excise laws. 1 B. & B. 5.

## WITNESS.

## Attendance of.

1. *Seemle*, that a party who is subpoenaed as a witness to attend at the assizes, is guilty of a contempt, by neglecting to attend, although the cause be not called on for trial. 3 B. & A. 598.

Incompetency  
from interest.

2. In an action on a joint contract against several partners, one of the defendants having suffered judgment to go by default, is not admissible as a witness, to prove the partnership of himself and the other defendants, without their consent, although the proposed witness is released as to all other actions, save that on which he is called to give evidence. 8 Taunt. 139.

3. On a question of title, in an action of trespass between a parish and an individual, to certain lands claimed by the former, under an inclosure act; by the provisions of which the land in dispute would (if they had a right to it) be vested in them, in trust for the parish, in aid of the poor's rates, rated inhabitants are admissible witnesses, by virtue of the 9th section of the 54th Geo. 3. c. 107. 6 Price, 146.

4. In trover by A. against B. C., is a competent witness to prove property in himself. 4 B. & A. 410.

5. Ruled at *Nisi Prius* by the lord chief baron, that a person having entered into a bond with sureties to the crown, is not an admissible witness in a *scire facias* against the surety, who proves that he had not broken the condition. *Sed, quære?* (the principal having been released by the surety.) 4 Price, 150.

6. In an action against a sheriff for a false return of *nulla bond*, after he has taken goods in execution, which have been forcibly taken out of his possession, and carried away by a person claiming property in them, such person is admissible to prove, that they were not the property of the debtor, against whom the execution had issued, because the sheriff cannot maintain an action against him, (the witness), for the rescue, after having made such a return, and as to all other persons claiming the goods, the verdict would be *res inter alios acta*, and, therefore, could not be used to affect their rights in any proceeding against the witness. 5 Price, 547.

7. On an issue to try whether the inhabitants of A. were immemorably bound to repair a chapel, the owner of the inheritance, having leased his property for years, at a rent certain, without any deduction, and residing himself in a different county; is not a competent witness to negative the liability, although he was not upon the rate, and the rate was in fact paid by his tenant, for such owner has an interest in discharging the inheritance for a permanent burden. 1 B. & A. 87.

8. One joint maker of a promissory note is a witness to prove the signature of the other. 5 M. & S. 71.

9. In an action against an attorney for negligence, in the negotiation of an annuity, the party, who, on the face of the deed, appeared to be the grantor, is a competent witness to prove it a forgery. 4 B. & A. 209. Incompetency from relative situation.

10. Where defendant's name had been registered as part-owner of a ship, upon the oath of C., and he had afterwards assigned his share to C., by bill of sale, in consideration of 5s., and covenanted, that he had a good title: held, that in an action against defendant for goods, furnished to the ship, charging him in respect of his interest only, it was competent to defendant to call C., as a witness, to prove that he had inserted defendant's name in the register, without his privity or consent, and that the bill of sale was merely to divest him of any supposed title. 5 M. & S. 244.

11. A commission for the examination of witnesses in a foreign country, directed the commissioners to examine the witnesses, on interrogatories, and to reduce the examinations into writing, in the English language, and send the same to England, and to swear and interpret the depositions of such witnesses as did not understand the English language. It appeared by the return, that the depositions in the first instance were reduced into writing in the foreign language, and translated by the interpreter into the English language, within an interval of six weeks. Held, that the commission was well executed by the commissioners returning the depositions so translated into the English language. 4 B. & A. 377. Examination of witnesses.

12. A witness cannot recover a compensation for his time, though an express promise be given him that he shall be paid for his loss of time. 1 B. & B. 515. Expenses of witnesses.

13. Compensation for loss of time disallowed to two merchants coming from abroad as witnesses. 5 M. & S. 156. Costs of bringing up witnesses.

## WRITTEN INSTRUMENT.

1. Upon a plea of *plene administravit*, plaintiff, in order to show assets, gave, in evidence, a copy of a bill and answer, purporting to be an answer by a person of the same name, and sustaining the same character as the defendant. Held, that the copy was admissible, and that, on the face of it, there was presumptive evidence of identity, the defendant not having shown any circumstances to rebut the presumption. 1 B. & A. 182. Public writings judicial.

2. A record of condemnation of goods seized for an act of forfeiture, created by one statute, is not evidence, on a charge of an offence against the same party, with respect to the same goods, created by another statute. *Quære*, whether such a record is conclusive evidence in any case, of all the facts stated therein, so as to affect a defendant collaterally in any other proceeding against him, for penalties for the act of forfeiture? 3 Price, 195.

3. A testator, by his will, devised to *Matthew W.* his brother, and *Simon W.* his brother's son, a certain estate. It appeared, that the testator had three brothers, each of whom had a son of the name of *Simon*, living at the time of the testator's death. Held, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator as to the person intended, it being clear that the person entitled was *Simon*, son of *Matthew*. 4 B. & A. 57. Admissibility of parol evidence.

4. Where

4. Where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not admissible to show that, at the time of making it, it was agreed that it should not be payable till after the decease of the maker. 3 B. & A. 233.

5. When a deed purported to grant all the coal-mines in the lands in the occupation of widow K. and son, and the grantor had not, at that time, any lands in the occupation of widow K. and son, and the deed was founded upon a contract of sale executed some months before, to which the grantor's land-steward was the subscribing witness. Held, that for the purpose of explaining the latent ambiguity in the deed, letters written by the latter to the grantees, respecting the sale to them, by the grantor of the coal-mines, in the deed, and purporting to be written by his directions, were admissible evidence, without showing an express authority from the grantor to write them. 1 B. & A. 247.

Proof of, when  
not attested.

6. Entries in a steward's book, above thirty years old, and coming from the proper custody, are admissible in evidence, without proving the hand-writing of the steward. *Semble*, that the rule extends to all written documents coming from the proper custody. 4 B. & A. 376.

7. Where the defendants, having had notice to produce the probate of the will of their testator, refused to produce the same. Held, that an instrument produced by the officer of the ecclesiastical court, purporting to be the will of the defendant's testator, and indorsed by the officer, as being the instrument whereof probate had been granted to the defendants, and that they had sworn to the value of the effects, was admissible in evidence, in an action against the defendants, for money had and received by their testator in his lifetime. The court entertained the argument, notwithstanding there had been an injunction in the court of exchequer against further proceedings in this court. 1 B. & B. 219.

8. Where a loss had been settled upon a policy of insurance against fire in the year 1813, and upon a trial in 1819 the plaintiff in an action for libel, charging him with having made fraudulent claims upon the insurance company with respect to such loss, called their agent, who stated that the policy was returned to him after the fire, and that he had it in possession then, and afterwards when the plaintiff made a larger insurance with the company, that upon the loss having been settled, the old policy became an useless paper, that he did not know what had become of it, but he believed he had returned it to the plaintiff; the clerk to the plaintiff's attorney then proved, that within a few days of the trial he went to plaintiff's house to search for the policy, when the plaintiff showed every drawer where he usually kept his papers, that he examined such drawers and every other place where he thought it likely to find such a paper without finding it. Held, that this was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy. 3 B. & A. 296.

9. An indenture of apprenticeship made 1797 having been signed only by an overseer of the appellant parish, the respondent parish, to show that only one had been appointed in the year, called upon the appellants to produce the original appointment, (having given them notice to produce all books and writings relating thereto.) One book only was produced, and that was not for the year 1797. Held, that the respondents not having taken any means to procure the testimony of the overseer himself, (who must be presumed to have the custody of the original appointment,) were not entitled to give secondary evidence of its contents. 1 B. & A. 173.

10. The

10. The clerk of the defendant was the subscribing witness to a bond, and when he was subpoenaed, said that he would not attend, and the trial had been put off twice in consequence of his absence. Search had also been made at the defendant's house, and in the neighbourhood; and upon receiving information at the defendant's that the witness was gone to Margate, enquiry was there made without success. Held, that under these circumstances evidence of his hand-writing was admissible. 4 B. & A. 697.

Proof of, when attested.

11. In an action on a promissory note, the subscribing witness being dead, proof of his hand-writing, and that the defendant was present when the note was prepared, is sufficient without proving the hand-writing of the defendant. *Quære*, if proof of subscribing witness's hand-writing alone could have been sufficient? 1 B. & A. 19.

12. The commissioners under an enclosure act, having made minutes of their proceedings: held, that parol evidence of the divisions and allotments was inadmissible, the minutes of the commissioners not being produced or accounted for. 1 B. & B. 460.

Preference of one kind of instrument to another.

13. Where a plaintiff made affidavit that he sued defendant, to recover damages for a breach of agreement, in not entering into partnership, pursuant to a partnership deed drawn up and signed by plaintiff, but remaining in the custody of the defendant or his attorney; and that the plaintiff possessed neither copy nor counterpart of the deed; the Court granted a rule enabling the plaintiff to inspect the deed and take a copy, though the defendant swore he had not executed the deed. On a motion for leave to inspect a partnership deed, the affidavit should state that the party moving has neither copy nor counterpart. 1 B. & B. 318.

Inspection of.

14. The Court will not compel the vestry clerk of a parish to produce, and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes. 4 B. & A. 301.

THE END OF THE SEVENTH VOLUME.









